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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No.

CALIFORNIA MOTOR TRANSPORT CO., et al.,
Petitioners,

vs.

TRUCKING UNLIMITED, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on October 5, 1970.

Petitioners are the corporations named in Footnote 1 and respondents are the corporations, partnerships, or

[1]California Motor Transport Co.; Delta Lines, Inc.; Di Salvo Trucking Co.; Oregon Nevada California Fast Freight, Inc.; Southern California Freight Lines, Ltd.; Pacific Intermountain Express Co.; Pacific Motor Trucking Company; Ringsby Truck Lines; Shippers Express Company; Sterling Transit Company, Inc.; Valley Motor Lines, Inc.; T.I.M.E. Freight, Inc.; Walkup's Merchants Express; Willig Freight Lines; Garden City Transportation Co., Ltd.; California Cartage Company, Inc.; Boulevard Transportation Company; Callison Truck Lines, Inc., and Ringsby-Pacific Truck Lines (formerly Fortier Transportation Company).

individuals named in Footnote 2 below. Respondents declare in their First Amended Complaint that their complaint is also a class action on behalf of other carriers, deemed to exceed 100, similarly situated.

OPINIONS BELOW

The opinion of the District Court for the Northern District of California is reported at 1967 Trade Cases Paragraph 72,298 (N.D.Cal. 1967) and is printed as Appendix B hereto. The opinion of the Court of Appeals for the Ninth Circuit is reported at 432 F.2d 755 (1970) and is printed as Appendix A hereto.

JURISDICTION

The opinion and judgment of the Court of Appeals for the Ninth Circuit was entered on October 5, 1970. An extension of time for filing this petition to and including February 18, 1971 was granted by Mr. Justice Blackmun on December 22, 1970. A further extension of time for filing this petition to and including March 4, 1971 was

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[2]Trucking Unlimited, a corporation; Don D'Onofrio, an individual, dba Donofrio Drayage-Record Express; B.C. Lawson Drayage, Inc., a corporation; Cargo Carriers, Inc., a corporation; Meek Trucking Company, a corporation; L.D.S. Truck Lines, a corporation; G. A. Hutchinson & Son Draying, a corporation; Frank L. Nolan, Jr., an individual formerly a co-partner of Frank Nolan Drayage Co.; American Transfer Co., a corporation; Coast Drayage, a corporation; Ruddway Drayage Company, a corporation; Rose J. Antonini, Virgil J. Antonini, Administrator of the Estate of Louis E. Antonini, and Virgil J. Antonini, a partnership, dba Antonini Fruit Express; Johansen's Superior Truck Line, Inc., a corporation; Pozas Bros. Trucking Co., a corporation; and Spear Enterprises, Inc., a corporation dba United Truck Line.

granted by Mr. Justice Douglas on February 9, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. The basic question is whether Respondent's First Amended Complaint states a claim upon which relief can be granted.[3] Rule 12(b)(6) Fed.R.Civ.P. The answer turns on the following questions:

2. Does an alleged agreement with anticompetitive motive by a group of motor carriers, followed by the implementing and publicizing thereof, to carry out a jointly financed program of opposing, before the California Public Utilities Commission, the Interstate Commerce Commission, and the appropriate federal or state courts, all applications, irrespective of their merits, for certificates of public convenience and necessity, or for the transfer or registration of certificates, constitute a violation of the antitrust laws where there is no allegation that false or deceptive evidence was ever presented and no allegation that the administrative agencies and courts in question were ever lacking in, or failed to exercise, full power to control the extent to which they would allow protests or appearances or evidence?

3. Does not the *Noerr-Pennington* doctrine (*Eastern Railroad Presidents Conference v. Noerr*, 365 U.S. 127

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[3]The case arises on a motion to dismiss the First Amended Complaint. District Judge Sweigert held that such complaint does not state a claim upon which relief can be granted. The dissenting Senior Circuit Judge Hamlin agreed with him. The other two judges who considered the case, Circuit Judge Browning and designated District Judge Pregerson, held to the contrary.

(1961); *United Mine Workers v. Pennington,* 381 U.S. 657 (1965)), holding that Congress did not intend the Sherman Antitrust Act to apply to joint activities to influence governmental action, clearly extend to the alleged activities enumerated above?

4. Does not the *Noerr-Pennington* doctrine extend to such alleged activities even if the complaint be construed by inference to allege that a primary purpose of defendants was to discourage and deter respondents and others in like position from initiating or pursuing applications for certificates, or the transfer of registration thereof?

5. Would not a construction of the Sherman Antitrust Act to make unlawful the activities alleged in the First Amended Complaint infringe upon the constitutional right to petition provided for in the First Amendment?

STATUTES INVOLVED

The statutes involved are relevant portions of (1) the Sherman and Clayton Antitrust Acts, (2) the California Public Utilities Code, (3) the Interstate Commerce Act, and (4) the Administrative Procedure Act. Those provisions, together with pertinent portions of the rules of the Interstate Commerce Commission and the California Public Utilities Commission, are set forth in Appendix D hereto.

STATEMENT UNDER RULE 33(2)(b)

Since the proceeding draws into question the constitutionality of the Sherman and Clayton Acts, 15 U.S.C. §§1-27, when applied as the Court of Appeals has done

to the facts alleged in the First Amended Complaint, and since such Acts do affect the public interest and since neither the United States nor any agency, officer or employee thereof is a party, it is noted that 28 U.S.C. §2403 may be applicable.

No court of the United States as defined by 28 U.S.C. §451 has, pursuant to 28 U.S.C. §2403, certified to the Attorney General the fact that the constitutionality of such Acts of Congress has been drawn in question.

STATEMENT OF THE CASE

A civil antitrust action was filed on May 6, 1966 in the federal district court pursuant to 15 U.S.C. §§ 15 and 26, by 14 of the 15 trucking respondents against the 19 trucking petitioners, seeking treble damages and injunctive relief under the Sherman and Clayton Acts, 15 U.S.C. §§1-27.[4]

All the 15 complaining respondents allege in their complaint that they are highway carriers of property within California, operating under certificates or permits issued by the California Public Utilities Commission (PUC) for intrastate traffic, and under authorizations of the Interstate Commerce Commission (ICC) for interstate traffic. Similarly all the 19 defending petitioners are highway carriers operating in California under similar authority and jurisdiction of the California PUC and the ICC.

Petitioners moved among other things to dismiss the First Amended Complaint for failure to state a claim

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[4]The fifteenth respondent joined later.

upon which relief could be granted. Federal District Judge Sweigert granted such motion after receiving oral argument. His reasoning is set forth in his Memorandum of Decision, appended hereto as Appendix B. He opined that since the pleading had already been amended once, respondents had gone as far as they could "truthfully go toward alleging an antitrust violation", but he allowed them 15 days to file leave to amend. Appendix B, pp. 38, 39. They declined, and instead appealed his ruling.

One year after hearing oral argument on appeal the Court of Appeals overruled Judge Sweigert by a 2 to 1 vote. The opinion of the majority, and Senior Judge Hamlin's dissent, which supports Judge Sweigert's opinion, are set forth in Appendix A attached hereto.

The complaint mingles alleged facts with characterizations thereof or conclusions. The alleged facts are as follows, with the characterizations and conclusions set forth in the footnote following:

> FACTS ALLEGED: Petitioners since 1961 have conspired to weaken or put respondents and others in like position out of business. To this end they have:
>
> 1. *Agreed* jointly to finance and to carry out and publicize a consistent, systematic and uninterrupted program of opposing "with or without probable cause and regardless of the merits" every application, with insignificant exceptions, for additional operating rights or the registration or transfer of operating rights, before the California PUC, the ICC, and the courts on appeal.
>
> 2. *Carried out* such agreement (a) by appearing as protestants in all proceedings instituted by respondents and others in like position or by instituting complaints in opposition to applications or

transfers or registrations; (b) by establishing a trust fund to finance the foregoing, consisting of contributions monthly in amounts proportionate to each petitioner's gross income; (c) by publicizing and making known to respondents and others in like position the foregoing program.

3. *Achieved* their purpose (a) by depleting the resources of respondents and others in like position; (b) by delaying the ultimate granting of rights, transfers or authorizations; (c) by discouraging and deterring respondents and others in like position from initiating or pursuing requests, applications or actions for rights, transfers, or registrations.[5]

There is *no allegation* of fact that the PUC, the ICC, or the courts have at any time been prevented from exercising full control over their respective procedures or their determinations on the merits; or that petitioners lacked standing to appear and protest in such proceedings; or that respondents have ever complained before

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[5]CHARACTERIZATIONS OF FACTS ALLEGED OR CONCLUSIONS: By means of the facts alleged petitioners have practically and actually made unavailable, and have effectively closed to respondents and others in like position, free and unlimited access to the machinery of the California PUC, the ICC, and the courts; have clogged and impeded such machinery; have abused such machinery; have denied to the California PUC, and ICC, and the courts the benefit of facts which respondents might have presented had they not been discouraged or deterred; have harassed and obstructed respondents and others in like position; have defeated, delayed, or restricted rights, transfers and registrations, regardless of the merits, because without the intervention of petitioners there would have been no opposition and the agencies or courts would have decided in favor of respondents or others in like position; have thwarted the policy of the PUC in liberally granting operative rights; have become the regulators of the rights, transfers and registrations in place of the PUC, the ICC, and the courts; have acquired and aggrandized their economic power and their monopoly power.

those bodies of the presence of petitioners and sought to limit or prohibit their appearance and participation; nor is there any allegation that the evidence presented by petitioners has been irrelevant or false. Finally, there is no allegation that petitioners agreed between themselves that if any one of them should seek additional certificated authority the others would refrain from protesting.[6]

In granting the motion to dismiss Federal District Judge Sweigert observed that the First Amended Complaint is limited by its express language which states: "Plaintiffs . . . do not complain of any activities of defendants or their conspirators toward, or in reference to, any function of the ICC or PUC *except* as such activities pertain to the precise proceedings before such bodies". (Emphasis added by Judge Sweigert. Appendix B, pp. 20, 21.) He concluded that the holdings in *Noerr* and *Pennington* (*Eastern Railroad Presidents Conference v. Noerr*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965)) made clear that the Sherman Act does not cover the acts alleged in the complaint even assuming an overriding purpose to injure and destroy in ways unrelated to the actions of the regulatory bodies.

Respondents appealed. The Court of Appeals for the Ninth Circuit reversed, with Judge Hamlin writing a dissenting opinion.

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[6]In fact, several of petitioners have sought additional authority and have met with vigorous opposition by the others. E.g., *Walk-up's Merchants Express*, PUC Application No. 47472 (1965); *Pacific Motor Trucking Company*, ICC Docket No. MC78786 (Sub No. 268) (1967).

REASONS FOR GRANTING THE WRIT

Petitioners submit that the Ninth Circuit decision (A) conflicts with *Noerr* and *Pennington* decided by this Court in 1961 and 1965, respectively; (B) conflicts with *Association of Western Railroads v. Riss & Co.*, 299 F.2d 133, which was decided in 1962 by the Court of Appeals for the District of Columbia; (C) raises important and unsettled questions relating to the reach of the antitrust laws and violates the right to petition guaranteed by the federal Constitution; and (D) reaches a result which affects a substantial segment of the American society, including over three hundred trade associations which have expressed genuine concern over the decision.

A. CONFLICT WITH NOERR AND PENNINGTON

Petitioners respectfully urge that the Ninth Circuit decision is indeed in conflict, certainly in reasoning and principle, with this Court's decisions in *Noerr* and *Pennington*.

In *Noerr* three reasons were assigned by Mr. Justice Black, speaking for a unanimous Court, in concluding that Congress did not intend the Sherman Act to extend to joint efforts to influence public officials even though accompanied by an intent to eliminate competition: (1) Congress intended the antitrust laws to reach business activity, not political activity which is essentially dissimilar; (2) inclusion of political activity within the antitrust laws would prevent governmental bodies from obtaining needed information; (3) inclusion of political activity within the antitrust laws would raise serious questions of violation of the First Amendment right to petition.

1. Congress intended the antitrust laws to reach business activity, not political activity which is essentially dissimilar

This Court in *Noerr* held that the Sherman Act should not be interpreted to apply to joint agreements, with an anticompetitive motive, to influence public officials because such activity bears little resemblance to the kind of joint agreements with which Congress was concerned. Rather the congressional concern was with such devices as price-fixing agreements, boycotts and market-division agreements, all of them relating to business activity.

To get around this interpretation of the Sherman Act the Ninth Circuit majority rationalized that proceedings before administrative agencies and courts on the issue of public convenience and necessity are "adjudicatory" rather than "legislative" or political in nature, and that the patent cases[7] establish that anti-competitive agreements to seek or refrain from seeking action by adjudicatory bodies fall outside the *Noerr* doctrine.

The Ninth Circuit majority's exercise in labelling cannot withstand analysis under *Noerr* and *Pennington*. In the first place, the alleged agreements jointly to present

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[7] *Walker Process Equipment Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965) *United States v. Singer Manufacturing Co.*, 374 U.S. 174 (1963); *Kobe Inc. v. Dempsey Pump Co.*, 198 F.2d 416, 424-425 (10th Cir. 1952); *Lynch v. Magnavox Co.*, 94 F.2d 883 (9th Cir. 1938). The Ninth Circuit also relied on one pre-*Noerr* case involving joint appeals before administrative agencies. *Slick Airways, Inc. v. American Airlines*, 107 F.Supp. 199, 213-14, (D.N.J. 1951), *appeal dismissed*, 204 F.2d 230 (3rd Cir. 1953).

It seems unnecessary in this petition to set forth the analysis demonstrating that the patent cases are not relevant to the instant proceeding although bearing a superficial resemblance. It is noteworthy that this Court itself did not mention *Noerr* as having a bearing upon the *Singer* case, *supra*, although *Noerr* had only recently been decided.

commonly held positions before administrative bodies and courts have, like the joint activities in *Noerr* and *Pennington*, an "essential dissimilarity" with the business-type agreements traditionally held violative of the anti-trust laws.

Moreover, passages in both *Noerr* and *Pennington* indicate that the doctrine was intended to, or by necessary implication does, apply to joint appeals directed to all branches of government. Thus *Noerr* states:

> "To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the *government* of their wishes would impute to the Sherman Act a purpose to regulate, *not business activity*, but *political activity*, a purpose which would have no basis whatever in the legislative history of that Act." 365 U.S. 137 (Emphasis added.)

Again, in *Pennington* Mr. Justice White states for the court:

> "Joint efforts to influence *public officials* do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act." 381 U.S. 671 (Emphasis added.)

The use of the term "public officials", indicates that the doctrine comprehends appeals to officials in all branches of government. Cf. *NAACP v. Button*, 371 U.S. 415 (1963).

Even if the Ninth Circuit majority is right in limiting the scope of *Noerr-Pennington* to appeals to govern-

mental bodies acting in a legislative or quasi-legislative capacity it is basic error not to classify the alleged activities of petitioners as such. The determination of public convenience and necessity is in essence a legislative, policy-making function delegated by Congress or the state legislature. It is not litigation or adjudication in the normal sense.

The phrase "public convenience and necessity" is a term of art by which legislatures have traditionally delegated a large measure of legislative discretion to the regulatory body to determine what factors should govern the issuance of certificates according to the prevailing economic, political and social scene. See, for instance, the comments of Justice Frankfurter in *F.C.C. v. Pottsville Broadcasting Co.* (1940), 309 U.S. 134 at 137, 138.

The California PUC acts in a legislative capacity when it determines whether or not to issue a certificate of public convenience and necessity. *Southern California Edison Co. v. Railroad Commission,* 6 Cal.2d 737 at 748, 59 P. 2d 808 (1936); *San Diego and Coronado Ferry Co. v. Railroad Commission,* 210 Cal. 504, 292 Pac. 640 (1930); see Public Utility Regulatory Law, Vantage Press, 1956, by Judge Everett McKeage, former chief counsel and subsequently a member of the California Public Utilities Commission. Section 1005 of the California Public Utilities Code recognizes the legislative aspect of the issuance of certificates based upon public convenience and necessity by providing that the Commission may issue certificates with or without hearing. See Appendix D, p. 64.

The ICC is in like position as the California PUC. This Court long ago stated that the ICC cannot be regarded

as clothed with judicial functions or possessing the machinery of a court of justice. *Chicago Milwaukee & St. Paul Railway Co. v. Minnesota,* 134 U.S. 418 (1890). The ICC is not part of the federal judiciary but an "executive agency" of the federal government. See Democracy in Action by Milford Springer, Vantage Press, 1966, page 70 et seq.

The very fact that public convenience and necessity has in the past been attacked as an unconstitutional delegation of legislative authority because of its vagueness and lack of guiding standards attests to its essentially legislative and political character. *N.B.C. v. United States,* 47 F.Supp. 940 (S.D. N.Y. 1942); *Oro Electric Corp. v. Railroad Commission,* 169 Cal. 466, 147 Pac. 118 (1915).

Support for the conclusion that the regulation of entry into the field through certification is not a "judicial" but legislative function, if labels are to be used, is found in Judge Friendly's scholarly article, *The Federal Administrative Agencies; The Need for a Better Definition of Standards,* 75 Harv.L.Rev. 863, 871 (1962). See also the comments of Professor Davis in *Administrative Law Treatise* (1958) §7.20.

2. Inclusion of political activity within the antitrust laws would prevent governmental bodies from receiving needed information, especially in those areas where the policy of the government is to restrain competition rather than allow it

The second reason assigned by the Court in *Noerr* for concluding that the Sherman Act does not reach anti-competitive joint action in attempting to influence governmental action was that otherwise the power of govern-

ment to take actions through its legislature and executive in those areas that operate to *restrain* trade would be "substantially impair[ed]" because of the lack of adequate information. 365 U.S. at 137. The government cannot act as it should unless people can freely inform it without fear of antitrust violation. That reason applies with force in the area of certification of truck rights, an area in which the policy of government, both federal and state, is to *restrain* and *restrict* competition rather than allow free competition.

The Ninth Circuit majority, having labelled the certificating process as "adjudicatory", terminated the discussion, leaving unanswered the only really pertinent enquiry: is it the kind of proceeding in which potential competitors should be *encouraged* to protest and present evidence; does the administrative agency need to be informed by the very information and evidence which potential competitors are willing and can be counted on to produce if protected against the antitrust laws; is such information essential if the agency is to fulfil its obligation of making determinations of public convenience and necessity in accordance with economic, social and political considerations prevailing at the time? An applicant for a certificate, or the transfer thereof, can be counted on to submit the best possible case it can in support of the application. On the other hand, who is in a better position, and is more motivated, than the existing holders of certificates to present all of the information and policy considerations which militate against the issuance of the proposed authority?

Indeed, both the rules of the regulatory bodies in question and their long practice contemplate that potential

competitors shall be notified of each application so that they may provide the information and arguments in opposition to the application. Both the ICC and the California PUC recognize the propriety of participation, and indeed encourage the participation by existing certificated carriers, in applications for certificates, or in related proceedings. Applicants are required to notify potential competitors; such competitors may intervene and appear as parties; they may offer evidence and engage in cross-examination, and may file briefs and present oral argument, and they have standing to seek court review. The PUC or ICC hearing officer is given power to restrict presentation and cross-examination by intervening parties and to prohibit intervention unless the petitioner can demonstrate a legitimate interest. As to the ICC, see 49 C.F.R. §§1100.39, 1100.40, 1100.74, 1100.76, 1100.96, 1100.101, and 1100.247(d)(5). As to the PUC see Rules 21, 53-57, 75, 76 and California Public Utilities Code, sections 1731-1736, these rules and provisions are set out in Appendix D hereto.

When potential competitors do not appear the commissions often find themselves helpless to act with full information at their disposal since their own staffs are not geared or large enough to take an active hand except in special cases.

The First Amended Complaint itself recognizes that the information and evidence furnished by protesting carriers to the regulatory agency may be significant and convincing. Thus one finds the allegation (Appendix C, page 50): "Such decisions [by the PUC or ICC] . . . but for the defendants' combination and conspiracy,

would not have been rendered adverse to plaintiff and other competitors of defendants, because no opposition would otherwise have been commenced."

It is alleged in the First Amended Complaint (Appendix C, pp. 49-50) that petitioners would not have participated in the proceedings in question if not for the combination under which they could share the cost. Assuming the truth of this allegation, it simply points up the importance of immunizing such joint efforts from the sweep of the antitrust laws; unless it can be made economically feasible to protestants, through the pooling of their resources and the use of common counsel, to present evidence and policy considerations in opposition to certificate applications, the regulatory body is foreclosed from receiving information which is essential to adequate fulfilment of its delegated obligation.

Clearly the function of the PUC and the ICC in acting upon applications for certificates, or the transfer thereof,[8] is a policy-making function delegated by the legislature, and the PUC and ICC are as much in need of being informed by potential competitors in this area of restraint upon competition as the legislature itself would be.

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[8]The "public convenience and necessity" standard is set forth in California Public Utilities Code §1063, and in the Interstate Commerce Act, 49 U.S.C. §§306, 307, 309.

The legislative standards given the PUC and ICC to authorize transfers of certificates are even vaguer than for certification. The statutes in certain situations provide no standard at all. See California Public Utilities Code §851; Interstate Commerce Act, §212(b), 49 U.S.C. §312(b). In other situations "consistency with the public interest" is the only test. 49 U.S.C. §5(2)(b).

3. Inclusion of political activity within the antitrust laws would raise serious questions of violation of the right to petition guaranteed by the First Amendment of the U.S. Constitution

The third reason which impelled the Court in *Noerr* to conclude that the Sherman Act was not intended to cover solicitation of governmental action was that if a contrary interpretation were adopted it:

> ". . . would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms. Indeed, such an imputation would be particularly unjustified in this case in view of all the countervailing considerations enumerated above." 365 U.S. 138.

These constitutional considerations apply with equal force in the instant case, yet the Ninth Circuit brushed this constitutional guarantee aside without discussion, once it concluded that the proceedings in question were "adjudicatory".

As to the alleged appearance before the various courts, it is clear from the First Amended Complaint that the courts were involved only in their capacity as overseers of determinations made, in the first instance, by the two commissions. This being so, there is no valid basis to say that the alleged joint activity before the courts should be treated differently from the joint activity before the commissions. The reasoning in *Noerr* does not permit of such a distinction. *Baltimore & Ohio Ry Co. v. New York, N.H. & H.Ry,* 196 F.Supp. 724 (S.D.N.Y. 1961). Even if the appeal to the judiciary were not in connection with administrative action the antitrust immunity of *Noerr*

would hold. *Bracken's Shopping Center v. Ruwe,* 273 F.Supp. 606 (S.D.Ill. 1967). And this Court itself recognized in the landmark case of *NAACP v. Button,* 371 U.S. 415 (1963) that the joining together in proceedings before the judiciary is a right guaranteed by the First Amendment.

4. The Ninth Circuit majority's holding as to sham is also in conflict with Noerr

The Ninth Circuit majority held that even if the *Noerr-Pennington* doctrine applies to give antitrust immunity to joint solicitation of administrative bodies and courts as alleged, there are allegations in the First Amended Complaint which make the "sham" exception alluded to in a dictum in *Noerr* applicable. Here again the Ninth Circuit majority has misconstrued the *Noerr* decision.

This Court in *Noerr* held that antitrust immunity applies to group solicitation of governmental action *even* with the added factor, as found by the lower court, that the purpose of the defendant railroads was:

> ". . . more than merely an attempt to obtain legislation. *It was the purpose and intent . . . to hurt the truckers in every way possible* [by destroying their good will and their competitive position] *even though they* [the railroads] *secured no legislation.*" 365 U.S. 142. (Emphasis in original.)

This Court said that the right of the people to inform the representatives in government of their desires cannot properly be made to depend upon their intent in doing so, and therefore antitrust immunity applies regardless of intent, 365 U.S. 139. By way of dictum this Court added:

> "There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt *to interfere directly with the business relationships of a competitor* and the application of the Sherman Act would be justified." 365 U.S. 144 (Emphasis added.)

This Court said such "sham" exception was inapplicable because: "There are no specific findings that the railroads attempted directly to persuade anyone not to deal with the truckers." 365 U.S. 142.

In the instant case the Ninth Circuit majority said that the "sham" exception applies because the First Amended Complaint can be construed to allege a primary purpose "to impose a direct restraint under the guise of a program to induce governmental action," viz: a purpose to restrain competition directly by discouraging the filing of requests for such action. (Appendix A, pp. 11, 13, 14.) The Ninth Circuit majority reached this conclusion in spite of the fact that respondents have stated that "The misuse of the judicial process constitutes plaintiffs' [respondents'] entire factual and legal case." (Plt. Brief filed 5/16, 67; p. 42) and in spite of the fact that the First Amended complaint states:

> "Plaintiffs . . . do not complain of any activities of defendants or their conspirators toward, or in reference to, any function of the I.C.C. or P.U.C. *except* as such activities pertain to the precise proceedings before such bodies." Appendix B, pp. 20, 21. (Emphasis added.)

The holding of the Ninth Circuit majority flies directly in the face of the reasoning in *Noerr. First,* it presupposes

that intent or purpose has a bearing in determining whether joint solicitation of governmental officials is lawful, yet this Court said the contrary in the following words:

> "The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so." 365 U.S. 139. (Emphasis added.)

Secondly, the conclusion presupposes that if an effect of joint solicitation of governmental officials is to discourage the filing of requests with governmental officials, and that such discouragement is a primary intent or purpose, it is a direct restraint falling within the sham language. Yet the Court was quite specific in saying it meant something quite different. It twice said it was talking about attempts "to interfere directly with the *business relationships*" of a competitor (365 U.S. 144). To drive this point home concretely it said "There are no specific findings that the railroads attempted directly to persuade anyone not to deal with the truckers" (365 U.S. 142). By no stretch of the imagination does the First Amended Complaint allege an attempt by petitioners to persuade anyone not to deal with the respondent truckers, or any attempt in any way to interfere directly with the business relationships of the respondents.

The Court in *Noerr* recognized that adverse effects may occur but held that they do not alter the antitrust immunity even when such effects are the primary motive:

> "It is inevitable, whenever an attempt is made to influence legislation by a campaign of publicity, that an incidental effect of that campaign may be the infliction

> of some direct injury upon the interests of the party against whom the campaign is directed. And it seems inevitable that those conducting the campaign would be aware of, and possibly even pleased by, the prospect of such injury. To hold that the knowing of infliction of such injury renders the campaign illegal would thus be tantamount to outlawing all such campaigns." 365 U.S. 143, 144.

The *third* reason why the Ninth Circuit decision is wrong as to sham is that the First Amended Complaint reveals that petitioners enjoyed substantial success in their efforts before the regulatory bodies and courts. Appendix C, p. 50. As this Court pointed out in *Noerr,* that fact in itself disproves sham:

> "But this [sham] is certainly not the case here. No one denies that the railroads were making a genuine effort to influence legislation and law enforcement practices. Indeed, if the truckers' complaint is fully credited, as it was by the courts below, that effort was not only genuine but highly successful. Under these circumstances, we conclude that no attempt to interfere with business relationships in a manner proscribed by the Sherman Act is involved in this case." 365 U.S. 144.

Petitioners submit that the allegations of respondents state a case on all fours with *Noerr* on the question of sham, and it follows that the Ninth Circuit majority erred in finding that the First Amended Complaint stated antitrust activity falling within the sham exception to antitrust immunity. One is constrained to conclude that the Ninth Circuit majority was quite out of sympathy with the *Noerr-Pennington* doctrine which they characterized as "a

judicially implied exception" and sought to avoid it. Their conclusion is irreconcilable with *Noerr*, and their opinion if allowed to stand, will have serious adverse consequences. They have enlarged the potential crack in the dike of antitrust immunity suggested by the "sham" exception dictum to the *Noerr-Pennington* doctrine, to the point that many if not most of those who would be entitled to its protection now are faced with Hobson's choice: exposure to the floodwaters of private antitrust litigation or sacrifice of their rights under the law and constitution to participate in administrative and judicial proceedings affecting them. It is submitted that this Court *must not* allow such an unfortunate situation to be perpetuated.

B. CONFLICT WITH DECISION OF THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The decision of the Ninth Circuit majority in the instant case conflicts with the decision rendered shortly after, and in reliance upon, *Noerr*, by the Court of Appeals for the District of Columbia Circuit in *Association of Western Railways v. Riss and Co.*, 299 F.2d 133 (1962).

In that case an interstate trucker brought a treble damage antitrust action against 85 railroads, 4 railroad associations, and a public relations firm charging a conspiracy to monopolize and to eliminate Riss's competition in the transportation of ammunition and explosives for the United States.

In a brief decision the Court of Appeals reversed the lower court's action on the ground that the instruction

to the jury was contrary to the holding in *Noerr*. The instruction was that joint solicitation of government action with respect to the passage of enforcement of law violates the Sherman Act if its purpose is to destroy competition and if deceitful propaganda is used.

Reference to the decision of the district court in *Riss* (*Riss & Co. v. Association of American Railroads*, 170 F. Supp. 354 (1959)) reveals that the activities complained of included the following: carrying on a program of soliciting, either directly or through front organizations, officials of various states to take steps leading to the revocation of plaintiff's interstate operating authority; this included (a) employment of a public relations expert to persuade the Public Utilities Commission of Ohio to file proceedings before the Interstate Commerce Commission looking toward cancellation of plaintiff's operating authority; (b) abuse of the privilege of intervention in I.C.C. proceedings by joining together in an extensive and vicious campaign of anti-truck propaganda by which to persuade citizens' groups to register complaints against Riss in application proceedings before the I.C.C. initiated by Riss for new operating authority; (3) appeals to the Ohio Public Utilities Commission, either directly or through front organizations, to apply unusually strict enforcement against Riss of the applicable statutes and regulations.

These activities, as well as others enumerated in the complaint, were held on the authority of *Noerr* to fall outside the Sherman Act. It will be noted that the alleged activity before the ICC was evidently the presentation of evidence adverse to Riss in formal proceedings for certificates of public convenience and necessity, such evidence being of-

fered by groups which had been propagandized by defendants rather than by defendants themselves. This indirect approach to the regulatory body seems far less entitled to antitrust immunity than the honest, direct and forthright opposition of petitioners in the present case in application proceedings before the California PUC and the ICC.

The conflict between the *Riss* case and the instant one over the interpretation of *Noerr* should be resolved.

C. THE PRESENT CASE RAISES IMPORTANT AND UNSETTLED QUESTIONS RELATING TO THE REACH OF THE ANTITRUST LAWS IN THE LIGHT OF THE FIRST AMENDMENT OF THE CONSTITUTION.

This case raises the question of how the policy of the U.S. Government against monopolies and restraints of trade as set forth in the antitrust laws can be fitted in with the constitutional right to petition government and accommodated with the need of government to be informed. This in turn raises the question of how the accommodation once determined should be implemented. Should not the doctrine of primary jurisdiction or a doctrine akin thereto be invoked to deal with alleged abuses of the right to petition rather than an interpretation of the antitrust laws to extend to activity essentially political in nature? The following quotation from *Noerr* would suggest an affirmative answer: "The prescriptions of the [Sherman] Act, tailored as they are for the business world, are not at all appropriate in the political arena." 365 U.S. 141. Dissenting Circuit Court Judge

Hamlin of the Ninth Circuit reached that conclusion in the instant case:

> "The Public Utilities Commission has the power and ability to correct any abuses flowing from the activities of defendants through their opposition to the grant or transfer of certificates . . . and I think that the plaintiffs must look to the Commission, rather than to the Sherman Act, for their remedy." Appendix A, p. 15.

The instant case has already evoked one extensive law review note. 57 CALIF.L.REV. 518 (1969). Petitioners have been informed that another is on the way. Needless to say, the *Noerr-Pennington* doctrine and subsequent cases related to it have produced a substantial body of scholarly commentary, reflecting much diversity of opinion.[9]

The instant case, as to which the four judges who have considered it have split evenly, has created such uncertainty that the case in itself may well produce a chilling effect upon First Amendment rights. Thrown in doubt is not only the right to petition in concert, but also the right individually to advocate one's views freely, since the reasoning employed by the Ninth Circuit majority would apply equally to individual protests under Sherman Act, §2.

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[9]*See, e.g.*, Costilo, Antitrust's Newest Quagmire: The *Noerr-Pennington Defense*, 66 MICH.L.REV. 333 (1967); Walden, *More About Noerr—Lobbying, Antitrust and the Right to Petition*, 14 U.C.L.A.L.REV. 1211 (1967); Note, 47 CORNELL L.Q. 250 (1962); Note, *Application of the Sherman Act to Attempts to Influence Government Action*, 81 HARV.L.REV. 847 (1968); Note, 106 U.PA.L.REV. 69 (1957); Note 23 U.PITT.L.REV. 216 (1961); Note 33 ROCKY MT.L.REV. 413 (1961); Note, 70 YALE L.J. 135 (1960).

D. RESOLUTION OF THE ISSUES IN THIS CASE IS IMPORTANT TO A SUBSTANTIAL SEGMENT OF AMERICAN SOCIETY.

That the issues have a significance transcending the interests of the particular parties in this case is manifest from the canvass which petitioners have made of trade associations in the United States. Petitioners have received *over three hundred* expressions of interest, requesting a copy of the Ninth Circuit decision, and in some cases expressing grave concern over its effect upon their particular activities, and in a substantial number of instances indicating serious contemplation of the advisability of seeking the right to file an amicus curiae brief.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted

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March 4, 1971.

(Appendices Follow)

Appendix A

United States Court of Appeals
For The Ninth Circuit

No. 22,462

Trucking Unlimited, et al.,
Plaintiffs-Appellants,
vs.
California Motor Transport Co., et al.,
Defendants-Appellees.

[October 5, 1970]

Appeal from the United States District Court
for the Northern District of California

Before: Hamlin and Browning, Circuit Judges,
and Pregerson,* District Judge.

Browning, Circuit Judge:

This is an action by one group of trucking companies against another seeking treble damages and injunctive relief under the Sherman and Clayton Acts, 15 U.S.C. §§ 1-27. All are common carriers regulated by the California Public Utilities Commission (PUC) and the Interstate

*Honorable Harry Pregerson, United States District Judge, Central District of California, sitting by designation.

Commerce Commission (ICC) and require licenses from these agencies to operate.

The complaint alleges a conspiracy among defendants to restrain and monopolize the highway common carriage business in California and elsewhere by a jointly financed, widely publicized program of opposing, before the two commissions and the courts, all applications by actual or potential competitors for the issuance, transfer, or registration of operating rights. The district court dismissed the action on the ground that the complaint failed to state a claim upon which relief could be granted. Fed. R. Civ. P. 12(b)(6).[1] For the purposes of this appeal, we must accept all the allegations of the complaint as true, 2A Moore, Federal Practice ¶ 12.08, at 2266-67; and we can affirm only if "it appears beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim which would entitle [them] to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). *See Harman v. Valley National Bank,* 339 F.2d 564, 565 (9th Cir. 1964); *Corsican Productions v. Pitchess,* 338 F.2d 441, 442 (9th Cir. 1964).

The district court held that relief was barred by *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961), and *United Mine Workers v. Pennington,* 381 U.S. 657 (1965), which hold that the Sherman Act does not forbid attempts to influence the passage or enforcement of laws. We disagree for two reasons. First, concerted employment of judicial and administrative adjudicative processes as part of a scheme to restrain trade, as alleged in this complaint, is not excluded

[1]The district court's opinion is reported at 1967 Trade Cas. ¶ 72,298 (N.D. Cal. 1967).

from the Sherman Act by the *Noerr-Pennington* doctrine. Second, even if the *Noerr-Pennington* rule does apply to the use of judicial and administrative adjudicative processes in a scheme to restrain trade, relief is not barred if, as alleged in this complaint, the real purpose of defendants' joint activity was to restrain competitors directly, rather than to restrain them indirectly by inducing restrictive governmental action.

I

The *Norr-Pennington* principle is a judicially implied exception to the general rule that an unlawful purpose may bring otherwise lawful means within the proscription of the Sherman Act. *See American Tobacco Co. v. United States,* 328 U.S. 781, 809 (1946). The exception's premise is that the responsibility for enacting or not enacting laws concerning trade restraints rests with the legislative branch of government; and, similarly, responsibility for enforcing or not enforcing those laws rests with the executive branch. *Noerr, supra,* 365 U.S. at 135-136. Hence, valid legislative or executive action that results in the restraint or monopolization of trade does not violate the Sherman Act. *United States v. Rock Royal Co-operative, Inc.,* 307 U.S. 533, 560 (1939).[2]

Attempts to influence the legislative and executive branches are also excluded from the Sherman Act because prohibiting such activity "would substantially impair the

[2]The Supreme Court has also held that the Sherman Act does not apply to valid *state* legislative or executive action since "the Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state." Parker v. Brown, 317 U.S. 341, 351 (1943).

power of government to take actions through its legislature and executive that operate to restrain trade. In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." *Noerr, supra,* 365 U.S. at 137.[3]

And the Sherman Act does not apply to efforts to influence the enactment or enforcement of laws even when those efforts are motivated by an anticompetitive purpose because "it is quite probably people with just such a hope of personal advantage who provide much of the information upon which governments must act. A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them." *Id.* at 139.

This is a powerful argument for holding that joint efforts to influence legislative and executive action are excluded from Sherman Act liability regardless of purpose, but it does not justify immunizing agreements to utilize

[3]Such efforts are the "political activity" referred to in *Noerr.* The Court proffered two additional reasons for its holding: (1) the "essential dissimilarity" between agreements traditionally condemned by the Sherman Act—price fixing, boycotts and market divisions—and agreements to solicit the passage or enforcement of laws; and (2) the important constitutional questions concerning the right to petition the government that would be raised if the Act were construed to prohibit joint solicitation of government action.

judicial and administrative adjudicative processes in a scheme to restrain trade. The fundamental reason for the *Noerr-Pennington* exception does not apply. It is not the function of the courts to determine whether laws restraining trade will be adopted or, having been adopted, whether they will be enforced; nor is this the function of an administrative agency engaged in adjudication, as the PUC and ICC are here.[4] It would be pointless to limit the reach of the Sherman Act in order to protect the access of courts and agencies engaged in adjudicative functions to information and opinion relevant to determinations which they have no power to make.[5]

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[4]Licensing proceedings are adjudicative rather than legislative in nature. 5 U.S.C. § 551 (6)-(9). The PUC, for example, applies a standard of "public convenience and necessity," Cal. Pub. Util. Code § 1064, to the facts in each case—experience, financial ability, available equipment. *See, e.g.*, Encinal Terminals, 61 Cal. P.U.C. 807, 809-10 (1950). Davis characterizes as adjudicative "facts about the parties and their activities, businesses, and properties," 1 K. Davis, Administrative Law Treatise § 7.02, at 413 (1958), and Judge Friendly has described as judicial "the application of standards of greater or less generality to concrete cases." Friendly, The Federal Administrative Agencies: The Need for Better Definition of Standards, 75 Harv. L. Rev. 863, 874 (1962). Plaintiffs expressly excluded any PUC or ICC rule-making proceedings from the complaint.

Furthermore, beyond their efforts to influence administrative adjudicative processes, defendants allegedly pursued appeals in the courts from every adverse administrative determination. Even if the agency determinations were quasi-legislative, and thus within the *Noerr-Pennington* exception, court proceedings to review those determinations would be subject to the general strictures of the antitrust laws. *But see* Woods Exploration & Prod. Co. v. ALCOA, 284 F.Supp. 582, 594-595 (S.D. Tex. 1968).

[5]The holding in *Pennington* that it was error to instruct the jury in that case that joint "approaches" to Tennessee Valley Authority officials and to the Secretary of Labor might be illegal if accompanied by an anticompetitive purpose is not inconsistent with our conclusion that efforts to influence administrative adjudicative proceedings are not within the *Noerr-Pennington* exemption. There is nothing to indicate that the administrative action sought to be influenced was adjudicatory; the language of the *Pennington*

Accordingly, the general rule is applicable—the Sherman Act is violated by a conspiracy to unreasonably restrain or monopolize trade through the use of judicial and administrative adjudicative proceedings. *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965); *United States v. Singer Manufacturing Co.*, 374 U.S. 174 (1963); *Kobe, Inc. v. Dempsey Pump Co.*, 198 F.2d 416, 424-425 (10th Cir. 1952); *Lynch v. Magnavox Co.*, 94 F.2d 883 (9th Cir. 1938); *Slick Airways, Inc. v. American Airlines, Inc.*, 107 F.Supp. 199, 213-14 (D. N.J. 1951), *appeal dismissed*, 204 F.2d 230 (3d Cir. 1953).[6] *See also* Note, The Brakes Fail on the Noerr

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opinion suggests that it was not. Clearly, the decision of TVA officials to purchase their coal requirements on the open market was not adjudicatory in character. The nature of the "approach" to the Secretary of Labor is unclear. The Secretary has a good deal of discretion in determining whether to initiate proceedings under the Walsh-Healey Act to set a minimum wage in a given industry. 41 C.F.R. § 50-203.15; *see* Modley, Patton & Reilly, Problem Child Among Labor Laws—The Walsh-Healey Act, 1963 Duke L. J. 205, 210, 221; 48 Dep't of Labor Ann. Rep. 250 (1960). If the "approaches" were to influence his exercise of that policy-making function under the Act, they were protected under *Noerr*. *See* Harman v. Valley Nat'l Bank, 339 F.2d 564, 566 (9th Cir. 1964). Moreover, even if we assume that defendants sought to influence the wage determination itself, the proceeding by which that determination is made, though including a hearing, 41 U.S.C. § 43a(b), is nonetheless rule-making and quasi-legislative in nature, *see* 5 U.S.C. § 551(4) & (5); Wirtz v. Baldor Elec. Co., 119 U.S. App. D.C. 122, 337 F.2d 518, 534 (1963), rather than adjudicative.

[6]At the very least, these decisions demonstrate that agreements to use litigation as a means to restrain trade are not "essentially dissimilar," in the *Noerr* sense, from those traditionally condemned under the Sherman Act.

They also support the proposition that, on balance, the public interest in free competition served by the condemnation of agreements to use judicial and administrative adjudicative processes for the purpose of restraining trade outweighs the resulting restraint upon first amendment rights. *See* Note, The Brakes Fail on the Noerr Doctrine, 57 Calif. L. Rev. 518, 537-40 (1969). As the court

Doctrine, 57 Calif. L. Rev. 518 (1969). *But see Bracken's Shopping Center, Inc. v. Ruwe,* 273 F.Supp. 606 (S.D. Ill. 1967).[7]

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observed in Kobe, Inc. v. Dempsey Pump Co., 198 F.2d 416, 424 (10th Cir. 1952):

> "It is said that to allow recovery of damages resulting from the infringement action would be a denial of free and unrestricted access to the courts. We fully recognize that free and unrestricted access to the courts should not be denied or imperiled in any manner. At the same time we must not permit the courts to be a vehicle for maintaining and carrying out an unlawful monopoly which has for its purpose the elimination and prevention of competition."

See also Report of the Attorney General's National Committtee to Study the Antitrust Laws 248 (1955).

The overwhelming public interest in uninhibited communication between the people and their legislators and law enforcement officials that justifies immunizing joint efforts to influence those authorities from antitrust liability despite either wrongful purpose or the use of distortion and deception, does not apply to presentations to judges and administrative officials in the course of adjudicative proceedings. Unlike legislators and law enforcement officials, judicial and administrative adjudicators do not act in a representative capacity. There is a marked difference between the processes by which they arrive at decisions, the materials upon which they may properly rely, and the atmosphere consistent with effective performance of their respective functions. Sheppard v. Maxwell, 384 U.S. 333, 350-351 (1966); Bridges v. California, 314 U.S. 252, 271 (1941); Costilo, Antitrust's Newest Quagmire: The Noerr-Pennington Defense, 66 Mich. L. Rev. 333, 349 (1967); Note, The Brakes Fail on the Noerr Doctrine, 57 Calif. L. Rev. 518, 532-33 (1969); *cf.* Note, Application of the Sherman Act to Attempts to Influence Government Action, 81 Harv. L. Rev. 847, 849 (1968).

It is significant that in *NAACP v. Button,* 371 U.S. 415 (1963), a decision heavily relied upon by defendants, the Supreme Court discussed with approval cases that rely upon the actor's purpose in distinguishing the lawful and ethical from the unlawful and unethical in the area of stimulating litigation, *see* 371 U.S. at 439-441, and repeatedly noted that the NAACP acted with a lawful purpose in urging utilization of the courts. *Id.* at 429-430, 439-441. *See also* Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar, 377 U.S. 1 (1964); United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217 (1967).

[7]Other decisions are distinguishable. E. W. Wiggins Airways, Inc. v. Massachusetts Port Authority, 362 F.2d 52 (1st Cir. 1966), involved governmental rather than private action. In Okefenokee Rural Elec. Membership Corp. v. Florida Power & Light Co., 214

The district court considered *Singer* and the other patent cases inapposite because they involved patent litigation[8] and because litigation was only one of several means employed in the scheme to restrain trade. The court did not explain the significance of either factor, and we do not see any.

Because the legal monopoly conferred by a patent lends itself to misuse as a means to illegally monopolize and restrain trade, it is often a significant factor in determining whether a particular course of conduct violates the Sherman Act, that a patent is involved. This fact, however, has no bearing at all upon whether the *Noerr-Pennington* defense applies. That doctrine is concerned with protecting joint efforts to influence governmental action as such—the subject matter of the governmental action is beside the point. The significance of the cases cited is not that they involve the use of patent litigation to restrain trade, but that they involve the use of litigation for that purpose. They demonstrate that litigation can be an integral part of a scheme prohibited by the Sherman Act.

F.2d 413 (5th Cir. 1954), and Woods Exploration & Prod. Co. v. ALCOA, 284 F.Supp. 582 (S.D. Tex. 1968), the only injury alleged resulted from valid governmental action. Both of those cases as well as Association of Western Rys. v. Riss & Co., 112 U.S. App. D.C. 49, 299 F.2d 133 (1962), Schenley Indus. Inc. v. New Jersey Wine & Spirit Wholesalers Ass'n, 272 F.Supp. 872 (D. N.J. 1967), and A.B.T. Sightseeing Tours Inc. v. Gray Line N.Y. Tours, 242 F.Supp. 365 (S.D.N.Y. 1965), appear to have involved administrative rule-making rather than adjudication. Citizen's Wholesale Supply Co. v. Snyder, 201 F. 907 (3d Cir. 1913), involved efforts to influence a local prosecutor's enforcement of an ordinance, *see* Harman v. Valley Nat'l Bank, 339 F.2d 564 (9th Cir. 1964), and there was no allegation of anticompetitive purpose.

[8]Slick Airways, *supra*, cited with approval by the Supreme Court in Continental Ore Co. v. Union Carbide & Carbon Co., 370 U.S. 690, 707 (1962), did not involve patent litigation.

Pennington disposes of the second basis for distinction relied upon by the district court. If the *Noerr-Pennington* defense had applied to the use of litigation for the purpose of restraining trade, the defense would have been available whether this means was employed as part of a larger scheme or stood alone. *Pennington, supra,* 381 U.S. at 670. Furthermore, litigation and threats of litigation were the only means used to exclude competitors in *Walker Process.*

We conclude, therefore, that the *Noerr-Pennington* defense does not bar relief when a conspiracy to employ judicial and adjudicative processes in a scheme to restrain trade is alleged.

II

Dismissal was improper for another reason. Plaintiffs have alleged that defendants' real purpose was to restrain trade directly, rather than indirectly through the medium of governmental action. If this is true, plaintiffs may prevail under the "sham" exception to the *Noerr-Pennington* rule regardless of the status of joint approaches to adjudicative bodies under that defense.

The plaintiffs in *Noerr* contended, and the trial court found, that the defendants sought to injure plaintiffs directly by destroying their good will with the public and with their customers, thus weakening their competitive position and causing them to lose business. The Supreme Court noted that "the apparent effect of these findings is to take this case out of the category of those that involve restraints through governmental action and thus render inapplicable" the principle that efforts to induce such governmental action do not violate the Sherman Act. 365

U.S. at 142. The Supreme Court held, however, that plaintiffs' attempt to exclude their case from the latter category failed for want of evidence.

The Court pointed out that there was no finding that the defendants attempted directly to persuade anyone not to deal with the plaintiffs. On the contrary, the evidence reflected only efforts by the defendants to influence the passage and enforcement of laws. The Supreme Court concluded, therefore, that "the findings of the District Court that the [defendants'] campaign was intended to and did in fact injure the [plaintiffs] in their relationships with the public and with their customers can mean no more than that the [plaintiffs] sustained some direct injury as an incidental effect of the [defendants'] campaign to influence governmental action and that the [defendants] were hopeful that this might happen." *Id.* at 143.

This was not enough to render defendants' publicity campaign actionable. The Court noted that whenever an attempt is made to influence legislation by such a campaign it is inevitable that some incidential injury will be visited upon the opponents, and equally inevitable that those conducting the campaign will be aware of this possibility.

On the other hand:

> "There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified. But this certainly is not the case here. No one denies that the [defendants] were making a genuine effort

> to influence legislation and law enforcement practices. Indeed, if the version of the facts set forth in the [plaintiffs'] complaint is fully credited, as it was by the courts below, that effort was not only genuine but also highly successful. Under these circumstances, we conclude that no attempt to interfere with business relationships in a manner proscribed by the Sherman Act is involved in this case." *Id.* at 144.

The "sham" exception is derived from the basic rationale of the *Noerr-Pennington* defense: The Act does not bar legislation or law enforcement restraining trade and therefore does not bar the solicitation of such action. Conversely, if joint action is not for the purpose of restraining competition by inducing governmental action, but is rather for the purpose of imposing a direct restraint by the defendants' own conduct, the Sherman Act applies. *Cf. Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 706-707 (1962).

Plaintiffs assert that their proof[9] would establish such a conspiracy to impose a direct restraint under the guise of a program to induce governmental action. Briefly, they make the following allegations.

It was and is the policy of the PUC to encourage competition in the trucking industry by freely granting, and approving the transfer of, certificates of public convenience and necessity. Until 1963 it was the policy of the ICC to register any certificate issued by the PUC automatically, without further hearing.

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[9]Some of the details recited appear in plaintiff's briefs and are not specifically set out in the complaint. The allegations of the complaint are clearly sufficient to allow their proof.

In 1961 defendant trucking companies, the largest highway common carriers in California and the western states, undertook to lessen competition from smaller companies resulting from the relatively easy access to operating rights. They decided to accomplish this objective, not by seeking to induce the PUC to change its policy, but rather by discouraging the filing of applications with the PUC and the ICC. To that end they agreed to take, and took the following steps.

They agreed to and did establish and maintain a joint trust fund by monthly contributions based upon each defendant's gross income. They informed their competitors that they would use this trust fund to finance opposition to all applications then pending or thereafter filed by their competitors with the PUC or the ICC; that each and every application would be opposed with or without probable cause, and regardless of its merits; and that in every case defendants would pursue their opposition through all stages of administrative and judicial review. Defendants told their competitors that they could avoid the expense and delay resulting from defendants' opposition only by abandoning pending applications and severely limiting or refraining entirely from filing further applications.

As a direct result of defendants' joint activities, the financial resources of plaintiffs and other competitors of the defendants were depleted; applications by plaintiffs and other competitors for the issuance, transfer, or registration of operating rights were defeated, delayed, or restricted; and plaintiffs and other competitors were deterred from instituting or pursuing such applications.

Defendants' joint activities effectively foreclosed plaintiffs and other competitors from access to the PUC, the ICC, and to the courts in review proceedings; it denied those agencies and the courts the benefit of facts and information required for the making of competent decisions; and it severely curtailed competition.

The rationale underlying the *Noerr-Pennington* defense does not dictate immunity for this alleged conspiracy. The purpose of defendants' joint activity was not to induce action by the affected governmental agencies, but to preclude it. That is hardly a "genuine" effort to influence governmental action in the *Noerr* sense. Prohibiting such joint activity under the Sherman Act would not "impair the power of government to take actions . . . that operate to restrain trade." *Noerr, supra,* 365 U.S. at 137. It would not impede "the ability of the people to make their wishes known to their representatives" in any legitimate sense, *id.;* nor "deprive the government of a valuable source of information." *Id.* at 139.

Nonetheless, the district court held the "sham" exception inapplicable because plaintiffs did not allege that the presentations which defendants made to the agencies and the courts were in themselves false, misleading, or lacking in evidentiary or legal support. But the question is whether the defendants sought to restrain competition by inducing restrictive governmental action, on the one hand; or, on the other, sought to restrain competition by the deterrent effect of their own joint activity.

That their joint activity took the form, in part, of solicitation of governmental action and that they made a genuine effort to support all protests as effectively as

possible would not negate a primary purpose to restrain competition directly. The means allegedly adopted by defendants to deter agency action was to discourage the filing of requests for such action by a jointly financed, well publicized program of opposing every application filed. Since all applications were to be opposed, it is irrelevant that a valid basis existed for opposing some applications. Nor is it relevant that the opposition was as effective as defendants could make it; mere token opposition would not have the requisite deterrent effect.

The purpose of this alleged conspiracy was to inflict injury upon competition directly by defendants' own joint activity. Inevitably, given the nature of the means employed, defendants' activity would also injure competitors indirectly by influencing rulings of the agencies and the courts. Here, however, that indirect injury is merely incidental; and its occurrence cannot justify application of the *Noerr-Pennington* defense. As a practical matter, to hold otherwise would make the "sham" exception inapplicable to any conspiracy to restrain trade cloaked with the mantle of a campaign to influence governmental action. *Cf. Noerr, supra,* 365 U.S. at 143-144.

Reversed and remanded for further proceedings.

HAMLIN, Circuit Judge, dissenting:

I respectfully dissent.

Section 1063 of the California Public Utilities Code provides that no highway common carrier may operate without a certificate from the Public Utilities Commission "declaring that the public convenience and necessity require such operation." In order to exercise its judgment

implementing the broad statutory standard of "public convenience and necessity" in an individual case, the Public Utilities Commission is largely dependent upon information provided by the applicant and competing carriers. See *Peninsula Motor Express,* 49 Cal. P.U.C. 807 (1950). The activities of defendants in supplying this information to the Commission is thus lawful.

In my view, the activities of the Public Utilities Commission in the implementation of the broad statutory standard is one akin to policy making. The participation of the defendants in this policy making process, through their opposition to the grant of certificates or transfers of certificates is in my opinion protected from Sherman Act liability by the decisions of the United States Supreme Court in *Noerr* and *Pennington,* despite the assumption, arising from the posture of this case, that defendants have an anti-competitive motive. The Public Utilities Commission has the power and ability to correct any abuses flowing from the activities of defendants through their opposition to the grant or transfer of certificates, see California Public Utilities Code §§ 1062, 1064, and I think that the plaintiffs must look to the Commission, rather than to the Sherman Act, for their remedy. See *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.,* 424 F.2d 25, 30 (1st Cir. 1970). See generally, Note, Application of the Sherman Act to Attempts to Influence Government Action, 81 Harv. L. Rev. 847 (1968).

For these reasons, and for the reasons stated by Judge Sweigert in his United States District Court decision, reported in 1967 Trade Cases ¶ 72,298 (N.D.Cal. 1967), I would affirm.

Appendix B

United States District Court
Northern District of California

No. 45,073

Trucking Unlimited, et al.,
Plaintiffs,
vs.
California Motor Transport Co., et al.,
Defendants.

MEMORANDUM OF DECISION

Sweigert, J.

This is a civil antitrust class action for treble damages brought under Section 4 of the Clayton Act, 15 U.S.C. § 15, by fourteen plaintiffs, each engaged in transportation of goods by motor vehicle under regulation of the California Public Utilities Commission (PUC) and the Interstate Commerce Commission (ICC), charging nineteen individually named defendants, similarly engaged and regulated, with violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2.

The case is before the Court on defendants' motion under Rule 12(b)(6), Fed. R. Civ. P., to dismiss the First Amended Complaint for "failure to state a claim upon which relief can be granted."

The record consists of the Complaint, the First Amended Complaint and the pending motion. No facts beyond the pleading are presented by either party through affidavit or otherwise except as may be hereafter specifically noted.

The First Amended Complaint alleges in substance and effect (See: First Amended Complaint, par. 8, A-I, pp. 6-13) that ever since February, 1961, defendants have conspired to put plaintiffs and their other competitors out of business and for that purpose have combined their financial and other resources to carry out a consistent, systematic and uninterrupted program of instituting through the procedural machinery of the California PUC, the ICC and of the courts, opposition to every request or application (mainly applications for certification under the public convenience and necessity provisions of the California Public Utilities Act, §§ 1061-1073) made by plaintiffs or by other competitors of defendants before such agency, and to appeal any rulings of those agencies to the courts, all "without probable cause" and "regardless of the merits of the cases of plaintiffs and defendants' other competitors or of the merits of defendants' opposition."

It is further alleged that defendants have contributed to a special trust fund for this purpose according to their respective yearly gross incomes and regardless of whether a contributor has a competitive interest in any particular request or application made by plaintiffs or other competitors; that without such an agreement to jointly finance such oppositions, such oppositions would not be made at all because of the great expense involved in such

a program of protests; that, upon prevailing against plaintiffs and other competitors, defendants engage in a joint program of also resisting rehearings, reviews or appeals sought by plaintiffs or other competitors; that defendants have made known to plaintiffs and other competitors their intended program of combined and well-financed opposition in order to induce plaintiffs and their other competitors to abandon existing applications or requests and to refrain from making further applications or requests; that defendants have thus depleted the resources of plaintiffs and other competitors expended in resisting or overcoming the defendants' conspiracy of opposition; that defendants have thereby deprived the agencies and courts of the benefit of facts and information, and that defendants have defeated applications and requests of plaintiffs and other competitors on the basis of decisions which, but for defendants' combination, would not have been rendered adversely to plaintiffs and other competitors because, absent such conspiracy of opposition, no opposition would have been made.

Defendants contend that this First Amended Complaint should be dismissed upon the ground that under the doctrine of *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) the kind of activities alleged are immune from challenge under the antitrust laws.

We recognize, of course, that a complaint should not be dismissed under Rule 12(b)(6) Fed. R. Civ. P., for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which

could be proved in support of the claim. *Moore's Federal Prac.* Vol. 2A § 12.08.

Before considering the applicability of *Noerr* and *Pennington,* we point out that the First Amended Complaint does not charge acts in restraint of trade or attempts at monopoly except in the one respect that defendants associated for the purpose of intervening in regulatory proceedings to oppose plaintiffs' applications.

There is no allegation that defendants have engaged in, or conspired to engage in, any other conduct designed to restrict the competition of plaintiffs or to monopolize the industry, e.g., rate control, restriction of service, boycott or blacklisting of plaintiffs or plaintiffs' customers or any similar conduct which might violate the antitrust laws.

Thus, plaintiffs' First Amended Complaint has been narrowly drawn to present the single question of whether defendants' association for intervention in regulatory proceedings before the PUC or the ICC—without any other alleged anti-competitive conduct—is rendered violative of the antitrust laws by reason of defendants' alleged anti-competitive purpose and intent.

As plaintiffs state in their brief, "The misuse of judicial process constitutes plaintiffs' entire factual and legal case, not an insignificant matter incidental to different facts and legal theories." (Plt. Brief filed 5/16/67; p. 42). Further, the First Amended Complaint states that "Plaintiffs, and other competitors of defendants who are joined herein or who are members of the designated class, do not complain of any activities of defendants or their conspirators toward, or in reference to,

any function of the ICC or PUC *except* as such activities pertain to the precise proceedings before such bodies." (First Amended Complaint, Par. 7, p. 5).

Noerr, supra, was an action by a group of trucking companies under Section 4 of the Clayton Act for treble damages and injunctive relief against a group of railroads alleging that the railroads had engaged a public relations firm to conduct a publicity campaign against the truckers designed to foster the adoption and retention of laws and law enforcement practices destructive of the trucking business.

The trial court, disclaiming any purpose to hold illegal mere efforts on the part of the railroads to influence the passage of new legislation or the enforcement of existing law, rested its judgment against the railroads upon findings, first, that the railroads' publicity campaign, insofar as it was actually directed at lawmaking and law enforcement, was malicious in that its only purpose was to destroy the truckers as competitors and, further, was fraudulent in that it involved deceiving the lawmaking and law enforcement authorities by use of the so-called third party technique; and, secondly, that the railroads' campaign also had as an important, if not overriding purpose, the destruction of the truckers' good will among the general public and the truckers' customers, thus injuring the truckers in ways unrelated to the passage or enforcement of laws.

On appeal, the Supreme Court reversed the judgment. After stating the principle that "the Sherman Act does not prohibit two or more persons from associating together to persuade the legislature or the executive to

take particular action with respect to a law that would produce a restraint or a monopoly", the Supreme Court held that none of the factors reflected in the trial court's findings were sufficient to remove the case from this controlling principle.

Specifically, the Supreme Court held that the fact, established by the trial court's finding, that "the railroads' sole purpose in seeking to influence the passage and enforcement of laws was to destroy the truckers as competitors for the long distance freight business", would not "transform conduct otherwise lawful into a violation of the Sherman Act." (365 U.S. 127, at pp. 138, 139).

The Supreme Court further concluded that the use by the railroads in their campaign to influence governmental action of the so-called third party technique, involving deceptive and unethical public relations propaganda, would not constitute a violation of the Sherman Act because the Act is directed at trade restraints, not against political activity designed to influence governmental action. (365 U.S. 127, at pp. 140, 141).

The Supreme Court further at p. 144, concluded that, assuming application of the Sherman Act might be justified in situations in which a publicity campaign, ostensibly directed toward influencing governmental action, would be a "mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationship of a competitor" such was not the case before it since no one denied that the railroads were making a genuine and apparently successful effort to influence legislation and law enforcement practices.

Pennington, supra, was an action by the United Mine Workers (U.M.W.) for royalty payments. The defendants, certain coal companies, filed a cross-claim for damages alleging that the U.M.W. and certain other large coal companies had violated Sections 1 and 2 of the Sherman Act by: (1) entering into a Wage Agreement, which was later established under the Walsh-Healy Act by the Secretary of Labor, that provided a minimum wage for employees of contractors selling coal to the T.V.A., (2) imposing this Wage Agreement on all coal companies without regard to their ability to pay, and (3) waging a destructive and collusive price-cutting campaign in the T.V.A. "spot market" (which was exempt from the Walsh-Healy order) with the purpose of eliminating the smaller companies from the market.

After a jury trial, a verdict was returned in favor of the defendants on their antitrust cross-claim against the union. The trial court set aside the antitrust verdict against the plaintiffs, but denied a union motion for judgment notwithstanding the verdict or in the alternative for a new trial—a motion based on the ground that the union was exempt from liability under the facts of the case and also upon claimed trial court errors. The Court of Appeals affirmed denial of the union's motion, holding that the union was not exempt from liability under the Sherman Act and, further, that the instructions were adequate and that the evidence was sufficient to support the verdict.

The Supreme Court agreed that the agreement between the U.M.W. and the larger coal operators was not exempt from the antitrust laws under § 20 of the Clayton

Act, and § 4 of the Norris-LaGuardia Act. However, the Supreme Court went on to hold that the trial court had erroneously denied the motion of the U.M.W. for a new trial on the ground that there had been errors in the admission of evidence and in instructions, stating on pages 669 and 670:

> "We agree with the U.M.W. that both the Court of Appeals and the trial court failed to take proper account of the *Noerr* case. In approving the instructions of the trial court with regard to the approaches of the union and the operators to the Secretary of Labor and to the TVA officials, the Court of Appeals considered *Noerr* as applying *only* to conduct 'unaccompanied by a purpose or intent to further a conspiracy to violate a statute.' * * * Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act. The jury should have been so instructed and, giving the obviously telling nature of this evidence, we cannot hold this lapse to be mere harmless error."

The *Noerr* and *Pennington* cases establish the rule that violation of the Sherman Act cannot be predicated upon combined attempts to influence the passage of laws or attempts to influence public officials in the enforcement of laws even when the sole purpose and intent of the persons engaging in such activity is, and the result may be to destroy their competitors.

The reasons given by the Supreme Court for this rule are threefold: (1) That this type of combination is essen-

tially dissimilar from the type of agreements traditionally condemned by the Sherman Act; (2) That holding this kind of activity subject to the sanctions of the Sherman Act would impair the power of government to act upon the basis of information provided to it by interested parties, and (3) That a construction of the Sherman Act, bringing this kind of activity within its purvue, would raise important constitutional questions, e.g., the right to petition.

Thus, the Supreme Court has in effect weighed these factors in balance with the factor of the antitrust intent or result of certain kinds of concerted activity and has concluded that the latter factor must be risked in order to subserve other governmental needs and political rights.

The *Noerr* doctrine has been recognized and applied in *United States v. Johns-Mansville,* 259 F.Supp. 440 (E.D. Pa. 1966) (involving alleged combination for informal approaches to municipal authorities to obtain restrictive specifications for certain pipe with intent to injure competitiors); *A.B.T. Sightseeing v. Gray Line,* 242 F.Supp. 365 (S.D.N.Y. 1965) (involving alleged combination to lobby lawmaking and administrative agencies of the City of New York with intent to ultimately eliminate competition); *Harmon v. Valley Natl. Bank,* 339 F.2d 564 (9th Cir. 1964) (involving alleged combination by defendants with the Attorney General of Arizona to commence a court action for the purpose of injuring a competitor); *Assn. of Western Ry. v. Riss,* 299 F.2d 133 (D.C. Cir. 1962) (involving an alleged combination of four Ry. Associations to influence legislative and administrative action with intent to destroy competition); and in *Baltimore &*

Ohio Ry. v. New York, N. H. & H. R. Co., 196 F.Supp. 724 (S.D.N.Y. 1961) (involving alleged combination to propagandize the ICC to impose certain rates on competitors together with the filing of a suit to obtain enforcement of the ICC rates).

In *Woods v. Aluminum Co.*, 36 F.R.D. 107 (S.D. Tex. 1963), the court refused to apply the *Noerr* doctrine on a motion for summary judgment where the allegation was to the effect that defendants had conspired to file "false nominations" with the Texas Railroad Commission (whose regulatory Act provided that every oil producer should file monthly forecasts ("nominations") of the amount of gas that could be produced and sold from oil fields. In that case, however, the court, posing the question whether the conduct complained of was "political in nature" held that, if defendants were enjoined from conspiring to submit "false nominations" with the Railroad Commission, (there are no such charges in our pending case) they would not thereby be deprived of any constitutional right to petition or participate in the governmental process; that defendants would only be prohibited from undertaking "certain joint business behavior which would not remotely infringe upon any of the constitutionally protected freedoms spoken of in *Noerr;* and, further, that, assuming plaintiff's activities were "political" in nature, the complaint also tendered the issue (unlike the pending case) whether defendants had conspired *in other respects,* apart from the filing of false nominations, to restrain competition."

In *Harmon, supra,* a civil action brought under the antitrust laws, our Court of Appeals, reversing dismissal

of the action on ground of failure to state a claim, considered an allegation to the effect that defendants had combined to induce the Attorney General of Arizona (alleged to have been a participant in the combination) to file a court suit under a state statute (authorizing the Attorney General to bring such action against building and loan associations in the event of certain irregularities specified in the statute) which suit resulted in placing Arizona S & L Association in receivership and closing its business. In the course of the receivership plaintiffs' contractual rights, acquired in dealings with the Arizona S & L Association, had been disallowed by the state court receiver.

The court, discussing the applicability of *Noerr, supra,* (and also of *Pennington, supra,* and *Association of Western Railways v. Riss, supra*) agreed that *Noerr* would apply whether or not the proceeding brought by the Attorney General had substantive merit and, that defendants' conduct (informing the Attorney General of alleged irregularities and persuading him to take the action) "would be essentially political in nature" and immune from attack for the reasons set forth in *Noerr.*

The court held, however, that the complaint in that particular case (unlike the First Amended Complaint here) could be read as alleging defendants' joint effort to influence the Attorney General "was but one element in a larger, long continued scheme to restrain and monopolize" the financial industry, pointing out that there was nothing in the complaint which would preclude proof that the alleged conspiracy was aimed, in part, directly at the re-

financing arrangements between plaintiff and the Arizona S & L Association.

In *Washington Brewers v. United States,* 137 F.2d 964, (9th Cir. 1943) a criminal prosecution against the defendants, Brewers Institute and others, for violation of the Sherman Act §§ 1 and 3, the court, although affirming the trial court's refusal to dismiss the indictment (alleging concerted fixing of prices) on demurrer, pointed out that, insofar as the indictment charged defendants with conspiring to influence the formulation of state policy concerning liquor and with combining to police the enforcement of state laws, it charged no antitrust offense saying: "We know of no reason why brewers, like other people, may not jointly advocate state legislation thought by them to be desirable, nor why they may not single or in concert, aid the authorities *in the policing of any legislation which it is within the competency of states to adopt.*" (emphasis added).

Plaintiffs first contend that the doctrine of *Noerr* and *Pennington, supra,* is applicable only to activities directed to the legislative branch of government for the enactment of laws or to the executive branch for the enforcement of laws and that the doctrine is not applicable to activities conducted through the procedural machinery of the courts or of regulatory agencies like the California PUC or the ICC in which certain quasi judicial functions are vested.

Although it is true that in *Noerr* and *Pennington,* the court was speaking in terms of the "legislative" and "executive" branches of government there involved, this Court is of the opinion that the rationale of the *Noerr-*

Pennington doctrine is clearly and equally applicable to activities directed to the courts or to regulatory agencies for the purpose of taking positions on points of fact or law pertinent to the regulatory acts.

The gist of the *Noerr-Pennington* doctrine is that concerted activities "conducted along lines normally accepted in our political system" are not rendered violative of the antitrust laws even though the purpose or result may be to injure a competitor.

The right of access to courts and regulatory agencies is just as much a political right as the right of access to the legislative and executives branches. In fact, the Supreme Court has expressly recognized that the right of access to judicial agencies is within the protection of the First Amendment right of petition and has held that a statute impairing such right is, therefore, unconstitutional, *NAACP v. Button,* 371 U.S. 415 at 430 (1963).

Both the ICC and PUC Acts, involved in the pending case, are framed in such manner as to invite intervention by members of the regulated industry and other interested persons in opposition to applications for certificates of the kind here involved. The regulatory agencies often encourage such intervention in order to provide them with pertinent information concerning public convenience and necessity without which these applications would be in effect mere one-sided proceedings.

It seems clear that, under the rationale of *Noerr,* the mere fact of association by defendants for the purpose of resort to the regulatory agencies of the courts in order to oppose applications by others in the manner provided by law could not be held a violation of the antitrust law—

even if the intent of defendants is, or the result might be, the injury of competitors.

The Noerr Doctrine

Plaintiffs next contend that defendants' purported access to and use of the procedures of the regulatory agencies and of the courts in the exercise of their rights is mere "sham" within the meaning of that term as used by the Supreme Court in *Noerr, supra.*

However, the First Amended Complaint does not allege that all or any of the oppositions mentioned in the pleading were filed or were to be filed without probable cause. The pleading carefully refrains from charging that the oppositions were false, misleading to the agency or lacking in factual allegation and legal theory arguably relevant to the function of the regulatory agency in determining public convenience and necessity. The allegation is merely that defendants combined to file them "with or without probable cause". This allegation falls far short of charging that the oppositions would not be upon probable cause. On the contrary, it implies that all or at least some of the oppositions may have been filed *with* probable cause.

Nor does the First Amended Complaint allege that all or any of the applications made by plaintiffs (which defendants oppose) were meritorious under the applicable regulatory acts. The allegation carefully refrains from alleging that they were. Plaintiffs merely allege that defendants combined to oppose their applications "regardless of the merits of" the applications. This falls short of alleging that the applications were meritorious. On the

contrary, it implies that all or at least some might be without merit.

Plaintiffs, themselves, in their Brief filed 5/16/67, p. 8, present certain exhibits showing that 21 out of 40 matters which had reached the decision stage as of 11/28/61, resulted in action favorable to defendants either because the opposed application was denied by the agency in whole or in part or substantially reduced in scope or because the application was dismissed by the applicant after defendants appeared in opposition.

In the light of the pleading, considered either alone or in the light of such exhibit, and in a light most favorable to plaintiffs, it is impossible for this Court to say that the pleading supports plaintiffs' conclusionary claim of "sham" as that term was used in *Noerr*.

On the contrary, just as the findings in *Noerr* negatived the theory of sham, so also the allegations here negative that theory and show, as in *Noerr*, that, whatever the ultimate purpose and intent of defendants may have been, the oppositions were not, so far as the pleading is concerned, sham but were genuine and in part successful.

To hold that this complaint alleges an antitrust violation would be to hold in effect that defendants are liable in damages for having associated to present their oppositions to the agencies regardless of the merit of the oppositions or lack of merit in the applications opposed—solely because defendants, according to the complaint, entertained an ulterior motive of injuring or destroying defendants' competition.

Whatever the law would be without *Noerr*, the Supreme Court has resolved the problem of bad purpose or intent

vis a vis freedom of resort to public officials and agencies by holding that the latter is to be subserved notwithstanding the risk of tolerating an anti-competition purpose of such resort and a possible anti-competitive result.

There is no good reason why regulated business firms may not freely submit their information and views on public convenience and necessity to the regulatory agency without subjecting themselves to antitrust attack upon the ground that their purpose was to restrict competition —an objective which may be easily implied because it is inherently involved in the regulatory act, itself, which is designed to restrict entries into the industry to those justified by findings of public convenience and necessity. In our opinion, the rationale of *Noerr* is such that this result is not required.

As impliedly recognized in *Noerr,* the "probable cause" or "merit" of such applications or oppositions as are presented to the regulatory agency (or to the legislative or other executive officials) can be left to their responsible expertise (and appropriate judicial review) rather than be presented to the courts in the guise of an antitrust suit.

The gist of plaintiffs' complaints is that the resort of defendants to the regulatory agencies to oppose and thereby put plaintiffs to the proof in support of their applications has made it "exceedingly expensive" for plaintiffs and others to obtain certificates.

Unfortunately, proceedings before courts or regulatory agencies, if opposed, entail expense in terms of time and money for both sides. But, this is inherent—so much so that, as plaintiffs say in their own brief, "Individually, the members of the Dwyer group" (defendants) "would

not take the action against plaintiffs which their conspiracy has allowed them to take" (Plt. Brief of 5/16/67, p. 6, line 6) and in their Amended Complaint they make the significant statement that decisions of the agency "but for defendants' combination and conspiracy, would not have been rendered *adverse* to plaintiffs and other competitors of defendants, *because no opposition would otherwise have been commenced.*" (Amended Complaint, par. 8(4)10, p. 12). (emphasis added).

The Patent Cases

Plaintiffs mainly rely upon cases involving the claim that combinations involving the threat or actual commencement of patent infringement suits were violations of the antitrust laws.

In *United States v. Singer Manufacturing Co.*, 374 U.S. 174 (1963) the United States sued to restrain Singer, the sole American manufacturer of certain sewing machines, from conspiring with two of its competitors, an Italian manufacturer (Vigorelli) and a Swiss manufacturer (Gegauf) to restrain interstate and foreign trade in sewing machines, specifically certain Japanese competition.

The District Court ruled for defendants on the ground that there did not appear to be a concert between Singer and its alleged co-conspirators to restrain the Japanese competition and that Singer was merely acting within its right to protect its own patent. The Supreme Court reversed, holding that, according to its interpretation of the trial court's findings, a conspiracy to exclude Japanese competition in violation of the Sherman Act was shown.

The findings were to the effect that defendants had combined (1) to withdraw opposition to each other's applications in the Patent Office in order to secure broad claims regardless of validity; (2) to cross-license and assign their respective patents on a world-wide royalty free basis, and (3) assignment of an American patent (owned by the Swiss manufacturer [Gegauf] in order that this patent could be more effectively enforced by Singer in the United States against the Japanese competition through infringement suits and certain Tariff Commission proceedings.

The Court said:

> "Thus, by entwining itself with Gegauf and Vigorelli in such a program Singer went far beyond its claimed purpose of protecting its own 401 machine—it was protecting Gegauf and Vigorelli, the sole licensees of the patent at the time, under the same umbrella. This the Sherman Act will not permit. * * * The fact that the enforcement plan likewise served Singer is of no consequence, the controlling factor being the overall common design, i.e., to destroy the Japanese sale of sewing machines in the United States by placing the patent in Singer's hands the better to achieve this result. It is this concerted action to restrain trade that condemns the transaction under the Sherman Act. * * * It is well settled that 'beyond the limited monopoly which is granted, the arrangements under which the patent is utilized are subject to general law. * * * By aggregating patents in one control the holder of the patents cannot escape the prohibitions of the Sherman Act. That Act imposes strict limitations on the concerted activities in which patent owners may lawfully engage."

In *Kobe v. Dempsey Pump Co.*, 198 F.2d 416 (10th Cir. 1952), an action for patent infringement, defendants counter-claimed alleging that plaintiff's misuse of its patent monopoly, including, among other things, the bringing of an infringement suit, violated Sections 1 and 2 of the Sherman Act.

Affirming a judgment for defendants on their antitrust counterclaim, the Court, dealing with plaintiff's contention that its monopolistic practices did not reach the defendants until the commencement of the infringement suit and that to allow recovery of damages would be a denial of free access to the courts, recognized that although free and unrestricted access to the courts should not be denied or imperiled in any manner, the courts should not be made a vehicle for maintaining and carrying out an unlawful monopoly having for its purpose the elimination and prevention of competition, adding, however, on p. 425:

> "We have no doubt that, *if there was nothing more than the bringing of the infringement action* (emphasis added) resulting damages could not be recovered, but that is not the case. The facts as hereinbefore detailed are sufficient to support a finding that, although Kobe (plaintiff) believed some of its patents were infringed, the real purpose of the infringement action . . . was to *further the existing monopoly* (emphasis added) and to eliminate Dempsey as a competitor. The infringement action and the related activities, of course, in themselves were not unlawful, and *standing alone would not be sufficient to sustain a claim for damages* (emphasis added) which they may have caused, but *when considered with the entire monopolistic scheme which preceded them*, (emphasis added) we think, as the trial court

did, that they may be considered as having been done to give effect to the unlawful scheme. . . ." distinguishing *Virtue v. Creamery Package Co.*, 227 U.S. 8 (1913) and *International Visable Systems v. Remington Rand*, 65 F.2d 540 (6th Cir. 1933) as involving "single and isolated actions not preceded by a long history of unlawful monopolization," 198 F.2d 416, at 425.

In *Lynch v. Magnavox*, 94 F.2d 883, 888-890 (9th Cir. 1938), the Court reversed a dismissal on demurrer of an antitrust complaint which alleged that defendants, who had cross-licensed their respective patents, had combined to restrain competition and to monopolize the radio speaker business by threatening radio manufacturers with a ruinous commercial campaign of letter writing and by threatening and commencing in bad faith groundless actions against the manufacturers and their customers for infringement of their allegedly invalid patents in order to force the manufacturers to discontinue purchase of radio speakers from anyone but defendants.

The Court held that, assuming each of the alleged acts to be lawful in themselves, the combination would be a violation of the antitrust laws if its purpose was to restrain competition or to attempt monopoly, saying: "In other words, if the purpose of the plan is to effect a monopoly or to fix prices . . . then the act is violated by use of any means to that end, *including a cross-licensing agreement.*" (emphasis added).

The theory of these cases, as set forth in *Mercoid v. Mid-Continent*, 320 U.S. 661, 665-666 (1943), is that a patentee has been given a privilege of limited monopoly

conditioned, however, by a public purpose; that, although he may enforce his patent rights (either directly obtained or acquired from others under assignment or license), he may not use his limited monopoly in such manner as enables him to acquire a broader monopoly than is within the strictly confined and precise terms of his patent grant; that the method by which his monopoly is sought to be extended is immaterial and that, when the patent is thus diverted from its statutory purpose, the antitrust laws apply.

Further, in these cases the combinations involved other acts of the conspirators, e.g., illegal cross-licensing schemes and similar activities, of which the infringement suits, or threats thereof were merely the effectuating means.

In none of these patent cases did the court hold or say that mere association for the bringing or threatening of a patent infringement suit—*without more*—is, itself, an antitrust violation merely because the associates may contemplate injury to a competitor.

On the other hand, it was early recognized in *International Visable Systems v. Remington-Rand*, 65 F.2d 540 (6th Cir. 1933) at 542, that the mere bringing of a patent infringement suit, even if alleged to have been brought maliciously and with the purpose of monopolizing an industry, does not state a violation of Section 2 of the Sherman Act (attempt to monopolize, i.e., regardless of concert of action) the Court saying:

> "The suit brought by appellee for the infringement of its patents cannot of itself be characterized as an attempt to monopolize trade or commerce. It was

> nothing more than a lawful method of protecting appellee's claimed monopoly under the patent laws * * * Moreover, the declaration in the petition that the suits for infringement were brought against appellant 'maliciously and without probable cause' adds nothing to the weight of the claim that the infringement suit was an attempt to monopolize trade or commerce", citing *Virtue v. Package Creamery*, 227 U.S. 8, 38 (1912).

In any event, the defendants in this pending case have not combined to bring patent infringement suits nor are they grantees of any monopoly which could possibly have been misused. They are simply certificated business entities in an industry which is competitive within a framework of regulation according to standards of public convenience and necessity.

It is, therefore, unnecessary to decide whether the patent cases indicate a special area to which the immunization doctrine of *Noerr* does not extend.

We only hold that the narrowly framed allegations of this Amended Complaint are such that the activities for which defendants have associated are and must be held immune from the antitrust laws—even though their ultimate purpose may be to reduce, injure or destroy competition.

The pleading has already been once amended and presumably, plaintiffs have gone as far as they can truthfully go toward alleging an antitrust violation. The First Amended Complaint will, therefore, be dismissed without leave to amend subject to the condition that, if plaintiffs move for leave to amend within fifteen (15)

days from the date of this order, the Court will consider whether their amended pleading is sufficient to state a claim upon which relief could be granted.

Dated: October 5th, 1967.

W. T. Sweigert,
United States District Judge

Original Filed October 6, 1967
Clerk, U.S. Dist Court,
San Francisco.

Appendix C

United States District Court
For the Northern District of California
Civil Action No. 45073

Trucking Unlimited, a corporation, Don D'Onofrio, an individual, dba Donofrio Drayage-Record Express, B. C. Lawson Drayage, Inc., a corporation, Cargo Carriers, Inc., a corporation, Meek Trucking Company, a corporation, L.D.S. Truck Lines, a corporation, G. A. Hutchinson & Son Draying, a corporation, Frank L. Nolan, Jr., an individual formerly a co-partner of Frank Nolan Drayage Co., American Transfer Co., a corporation, Coast Drayage, a corporation, Ruddway Drayage Company, a corporation, Rose J. Antonini, Virgil J. Antonini, Administrator of the Estate of Louis E. Antonini, and Virgil J. Antonini, a partnership, dba Antonini Fruit Express, Johansen's Superior Truck Line, Inc., a corporation, Pozas Bros. Trucking Co., a corporation, Plaintiffs,

vs.

California Motor Transport Co., a corporation, Delta Lines, Inc., a corporation, Di Salvo Trucking Co., a corporation, Oregon Nevada California Fast Freight, Inc., a corporation, Southern California Freight Lines, Ltd., a corporation, Pacific Intermountain Express Co., a corporation, Pacific Motor Trucking Company, a corporation, Ringsby Truck Lines, a corporation, Shippers Express Company, a corporation, Sterling Transit Company, Inc., a corporation, Valley Motor Lines, Inc., a corporation, T.I.M.E. Freight, Inc., a corporation, Walkup's Merchants Express, a corporation, Willig Freight Lines, a corporation, Garden City Transportation Co., Ltd., a corporation, California Cartage Company, Inc., a corporation, Boulevard Transportation Company, a corporation, Callison Truck Lines, Inc., a corporation, Ringsby-Pacific Truck Lines, a corporation (formerly Fortier Transportation Company), Defendants.

FIRST AMENDED COMPLAINT
(Jury Demanded)
Cause of Action of Plaintiff
B. C. LAWSON DRAYAGE, INC.

Plaintiff complains of defendants as follows:

Jurisdiction and Venue

1. This complaint is filed and these proceedings are instituted, against defendants under Title 15, Section 15 and 26 U.S.C., being a part of the antitrust laws of the United States, commonly known as the Clayton Act, for violations of the Sherman Act and the Clayton Act. The purpose of this action is to obtain injunctive relief and to recover damages, as provided by law, for injuries to plaintiff's business and property within the period allowed by law, which injuries proximately resulted from defendants' violations of the antitrust laws of the United States.

2. The unlawful acts and violations of law herein described have been conceived, carried out, made effective and performed in major part within the above district and division and have affected areas elsewhere in California and in other states.

Parties

3. Plaintiff is a corporation organized and existing under the laws of the State of California.

4. Plaintiff was at all times herein mentioned a highway carrier operating pursuant to a certificate or permit duly issued by the California Public Utilities Commission (P.U.C.) and pursuant to the authority of the Interstate Commerce Commission (I.C.C.). As a highway carrier, plaintiff was at all times herein mentioned in the business of transporting goods and packages throughout areas of California and of rendering to customers other services incidental to the actual transportation of such goods and packages.

5. The defendants are all corporations, each organized and existing under the laws of one of the states of the United States. Each defendant is found and transacts business within the above district and elsewhere in California and in some cases in other states. Each is engaged in the business of transporting goods and packages throughout areas of California and to and from other states and of rendering to customers other services incidental to the actual transportation of goods and packages.

Interstate Commerce

6. The violations herein alleged have occurred within the stream of interstate commerce and substantially, directly and adversely affect interstate commerce. All defendants are interstate instrumentalities who have improperly used their power over interstate commerce so as to adversely affect, restrict and impinge upon local commerce.

The Functions of the Regulatory Agencies as Involved in This Complaint

7. The grants of operating rights, consents to transfer rights or registrations of rights sought by plaintiff and other competitors of defendants and the filing of complaints by defendants against their competitors, as set forth in the following section entitled "The Violations", were initiated by the filing of formal applications, petitions or complaints with the California P.U.C. or I.C.C. Protests or oppositions to such filings were likewise initiated by similar formal writings. The proceedings or machinery by which such applications, petitions or complaints

were adjudicated were judicial in nature. Such proceedings generally involved formal filings, service of process, formal notice as regulated by statute or regulation, discovery, including the taking of depositions, issuance of subpoenas and subpoenas duces tecum in accordance with identical procedures used in the Superior Courts of California, the taking of oral or written testimony under oath, findings, conclusions, decisions and opinions, the use of precedent in the decisional processes and the making of a record of proceedings and testimony. Plaintiff and other competitors of defendants who are joined herein or who are members of the designated class do not complain of any activities of defendants or their co-conspirators toward or in reference to any function of the I.C.C. or P.U.C. except as such activities pertain to the precise proceedings before such bodies here described.

The Violations

8. On information and belief, plaintiff alleges that defendants have combined, contracted and conspired to restrain trade and commerce, have monopolized, attempted to monopolize and conspired to monopolize trade and commerce in the transportation of goods and packages in the above district and elsewhere, all in violation of Sections 1 and 2 of the Sherman Act. The violations of the Sherman Act constitute the behavior of defendants as follows:

A. Beginning in or about February 1961, and continuously thereafter, defendants and their co-conspirators, constituting the largest common carriers in the State of California and the Western United States, formed and entered into a conspiracy for

the agreed aim and purpose of putting their competitors, including plaintiff, out of business, of weakening such competitors, of destroying, eliminating and weakening existing and potential competition, and of monopolizing the highway common carriage business in California and elsewhere.

B. In order to accomplish the purposes of the conspiracy, and pursuant to agreement, the defendants have combined and committed their financial and other resources and utilized such resources to engage in the activities set forth herein.

C. In order to accomplish the purposes of the conspiracy, the defendants have agreed jointly to carry out a consistent, systematic, and uninterrupted program of instituting judicial proceedings or actions in the California Public Utilities Commission, the Interstate Commerce Commission, the Supreme Court of California, the United States District Courts, the United States Courts of Appeal, and the United States Supreme Court in opposition to, with but a few and insignificant exceptions, every request, application or action for operating rights, transfers of rights, or registrations of rights made or brought by plaintiff and other competitors of defendants before such agencies and courts. The conspiracy included the agreement to seek rehearings or take appeals to and through the various levels of the courts if such proceedings were lost by defendants and their co-conspirators or to oppose rehearings or appeals taken by plaintiff and other competitors if plaintiff and other competitors lost any such proceed-

ings. Defendants and their co-conspirators agreed to resist and oppose at all levels. The conspiracy included the agreement to jointly finance all opposition which, if such opposition were not so financed, would not have been made at all because of the great expense involved in such a program of protests.

D. In order to accomplish the purposes of the conspiracy, and pursuant to agreement, the defendants have instituted protest or opposition proceedings against plaintiff's and other competitors of defendants' applications or requests for rights, transfers of rights, and registrations of rights in the P.U.C. and I.C.C., and have filed complaint proceedings against plaintiff and other competitors of defendants in the P.U.C. Upon losing such proceedings, the defendants have filed for or sought rehearings, reviews or appeals of such decisions below, and accordingly have instituted proceedings for rehearing, review or appeal in the agencies and courts set forth herein. Upon prevailing against plaintiff and other competitors of defendants in the P.U.C. or I.C.C., the defendants have effected a joint program of resisting rehearings, reviews or appeals on the part of plaintiff and other competitors of defendants in the agencies and courts set forth herein.

E. In order to accomplish the purposes of the conspiracy, and pursuant to agreement, defendants have as a matter of policy instituted the proceedings and actions set forth herein with or without

probable cause, and regardless of the merits of the cases of plaintiff and other competitors of defendants, or of the defendants' opposition.

F. In order to accomplish the purposes of the conspiracy, and pursuant to agreement, the defendants have established a trust fund to finance their conspiracy, and each defendant has contributed finances to the fund in monthly payments in amounts proportionate to each defendant's yearly gross income, regardless of whether such contributing defendant participated in or had a competitive interest in the proceedings instituted by and on behalf of the defendants' conspiracy as set forth herein.

G. In order to accomplish the purposes of the conspiracy, and pursuant to agreement, the defendants have publicized and made known to defendants' competitors, including plaintiff,

(1) That the defendants' conspiracy, with its combination of financial wealth and resources, would be used to oppose, with but a few and insignificant exceptions, all applications, requests, or actions pending on behalf of plaintiff and other competitors of defendants at the time the conspiracy commenced, or to be made or brought by plaintiff or other competitors of defendants at all times thereafter;

(2) That such opposition proceedings would be instituted and pursued by defendants through the judicial machinery of the agencies and courts as set forth herein; and

(3) That it would be expeditious and wise for plaintiff and other competitors of defendants to terminate, abandon or surrender existing applications, requests or actions, and to limit severely or refrain entirely from making or bringing further applications, requests or actions for rights, transfers or registrations in the agencies and courts set forth herein, lest plaintiff or such other competitors of defendants be met with the combined wealth and resources of defendants.

H. Pursuant to conspiracy, the defendants have deliberately and purposefully achieved the agreed upon aims, as follows:

(1) The defendants have depleted the resources of plaintiff and other competitors of defendants who, even where granted the rights, transfers or registrations requested, have expended the wherewithal and resources required to remain in business or to compete successfully in resisting or overcoming the defendants' conspiracy.

(2) The defendants have delayed the ultimate granting of rights, transfers or registrations sought by plaintiff and other competitors of defendants so as to damage severely their ability to compete or remain in business even though all or part of the rights, transfers and registrations were ultimately granted.

(3) The defendants have successfully discouraged and deterred plaintiff and other competitors

of defendants from initiating or pursuing requests, applications or actions for rights, transfers or registrations.

(4) The defendants have practically and actually made unavailable to plaintiff and other competitors of defendants free and unlimited access to the judicial machinery of the agencies and courts as set forth herein.

(5) The defendants have clogged and impeded the judicial machinery of the agencies and courts set forth herein, thereby denying plaintiff and other competitors of defendants free and unlimited access thereto.

(6) The defendants have harassed and obstructed plaintiff and other competitors of defendants.

(7) The defendants have harassed and obstructed the judicial machinery of the agencies and courts set forth herein.

(8) The defendants have abused the judicial machinery of the agencies and courts set forth herein.

(9) The defendants have denied to the agencies and courts the benefit of facts and information, competently presented through established judicial procedures, upon which such agencies and courts make their decisions.

(10) The defendants, acting in concert, became capable of instituting opposition proceedings as set forth herein and have thereby defeated or restricted, in whole or in part,

rights, transfers and registrations requested or applied for by plaintiff and other competitors of defendants on the basis of decisions rendered on the merits of the issues presented. Such decisions which, but for the defendants' combination and conspiracy, would not have been rendered adverse to plaintiff and other competitors of defendants, because no opposition would otherwise have been commenced.

l. In order to accomplish the purposes of the conspiracy, and pursuant to agreement, the defendants, being possessed of monopoly power by reason of the combination of their wealth and resources, have in fact performed and done the acts, and have employed the means alleged herein.

Effect of Violations

9. By virtue of the violations of the antitrust laws on the part of defendants, competition of plaintiff and other competitors of defendants has been restrained, lessened, impaired and eliminated. The judicial machinery of the P.U.C. and the I.C.C. and the courts has been effectively closed to plaintiff and other competitors of defendants. Defendants have succeeded in defeating, delaying or restricting rights sought by plaintiff and other competitors of defendants, regardless of the merits, in situations where no protest would have been made at all except for the unlawful combination and purpose of the conspiracy and combined strength of the defendants. The defendants have, in effect, become the regulators of the grants of

rights, transfers and registrations to plaintiff and other competitors of defendants rather than the P.U.C., the I.C.C. and the courts. The value of the businesses of the plaintiff and other competitors of defendants has diminished because of difficulty encountered in transferring rights to willing purchasers. As a result of the foregoing, the defendants have acquired, implemented, fostered and aggrandized their economic and monopoly power.

Damages

10. As a direct and proximate result of the violations set forth herein, the value of plaintiff's business and property has been substantially injured, its profits seriously impaired, plaintiff has been required to make extensive expenditures as a result of defendants' actions, and it has suffered a loss of value, goodwill and reputation to its business, all in an amount presently unknown to plaintiff.

Second Cause of Action of Plaintiff
B. C. LAWSON DRAYAGE, INC.

1. Plaintiff repleads the First Cause of Action with the exception of subparagraph 8A.

2. Prior to 1961, pursuant to prior decisions rendered by the P.U.C., grants of operating rights to common carriers were liberally given. Applications by truckers for such rights were granted as a matter of course, with some of them encountering no opposition whatsoever and the remaining encountering only sporadic opposition. Also prior to 1961, defendants and other co-conspirators took full advantage of the above-described P.U.C. decisions, and to the extent that they desired them, applied for and

received extensive operating rights. Also prior to 1961, applications by truckers for the transfer of rights were freely granted, with most of them encountering no opposition whatsoever, and the remaining few encountering only sporadic opposition. Beginning in 1963, the I.C.C., upon granting of applications of truckers, permitted P.U.C. operating rights to be registered as part of the interstate authority of applying truckers.

3. Beginning in or about February 1961 and continuously and uninterruptedly through the dates of the filing of the complaint and this first amended complaint, defendants and their co-conspirators combined for the agreed aims and purposes of (a) denying plaintiff and other competitors of defendants the business advantage otherwise available to them by virtue of the policy of the P.U.C.; (b) denying plaintiff and other competitors of defendants the business advantage of having their applications for rights, transfers and registrations heard and granted without enervating, ceaseless and financially debilitating opposition; (c) thwarting the policy and aims of the P.U.C. in liberally granting operating rights; (d) depriving plaintiff and other competitors of defendants of valuable operating rights by rendering such rights difficult and expensive to transfer to a buyer or register with the I.C.C.; and (e) themselves becoming, in effect, the regulators, rather than the P.U.C., the I.C.C. and the courts, of the granting of operating rights, transfers and registrations by plaintiff and other competitors of defendants.

Causes of Action of Plaintiff
CARGO CARRIERS, INC.

1. Plaintiff repleads the First and Second Causes of Action of plaintiff B. C. Lawson Drayage, Inc. as though fully set forth herein.

2. Plaintiff is the assignee of all of the right, title and interest in the claims here asserted of B.B.S. Transportation Co., Inc.

Causes of Action of Plaintiff
L.D.S. TRUCK LINES

1. Plaintiff repleads the First and Second Causes of Action of plaintiff B. C. Lawson Drayage, Inc. as though fully set forth herein.

Causes of Action of Plaintiff
JOHANSEN'S SUPERIOR TRUCK LINE, INC.

1. Plaintiff repleads the First and Second Causes of Action of plaintiff B. C. Lawson Drayage, Inc. as though fully set forth herein.

Causes of Action of Plaintiff
POZAS BROS. TRUCKING CO.

1. Plaintiff repleads the First and Second Causes of Action of plaintiff B. C. Lawson Drayage, Inc. as though fully set forth herein.

Causes of Action of Plaintiff
TRUCKING UNLIMITED

1. Plaintiff repleads the First and Second Causes of Action of plaintiff B. C. Lawson Drayage, Inc. as though fully set forth herein.

Causes of Action of Plaintiff
G. A. HUTCHINSON & SON DRAYING

1. Plaintiff repleads the First and Second Causes of Action of plaintiff B. C. Lawson Drayage, Inc. as though fully set forth herein.

2. Plaintiff is the assignee of all of the right, title and interest in the claims here asserted of G. A. Hutchinson dba G. A. Hutchinson & Son Draying.

Causes of Action of Plaintiff
DON D'ONOFRIO,
dba DONOFRIO DRAYAGE-RECORD EXPRESS

1. Plaintiff repleads the entire First Cause of Action with the exception of Paragraph 3 and the Second Cause of Action of plaintiff B. C. Lawson Drayage, Inc. as though fully set forth herein.

2. Plaintiff is an individual doing business as Donofrio Drayage-Record Express.

Causes of Action of Plaintiff
FRANK L. NOLAN, JR.

1. Plaintiff repleads the entire First Cause of Action with the exception of Paragraph 3 and the Second Cause of Action of plaintiff B. C. Lawson Drayage, Inc. as though fully set forth herein.

2. Plaintiff is an individual, formerly a copartner of Frank Nolan Drayage Co.

Causes of Action of Plaintiff
COAST DRAYAGE

1. Plaintiff repleads the First and Second Causes of Action of plaintiff B. C. Lawson Drayage, Inc. as though fully set forth herein.

Causes of Action of Plaintiff
AMERICAN TRANSFER CO.

1. Plaintiff repleads the First and Second Causes of Action of plaintiff B. C. Lawson Drayage, Inc. as though fully set forth herein.

Causes of Action of Plaintiff
RUDDWAY DRAYAGE COMPANY

1. Plaintiff repleads the First and Second Causes of Action of plaintiff B. C. Lawson Drayage, Inc. as though fully set forth herein.

Causes of Action of Plaintiff
MEEK TRUCKING COMPANY

1. Plaintiff repleads the First and Second Causes of Action of plaintiff B. C. Lawson Drayage, Inc. as though fully set forth herein.

2. Plaintiff is the assignee of all of the right, title and interest in the claims here asserted of W. H. Meek, Jr. dba McDermott Trucking Co.

Causes of Action of Plaintiff
ROSE J. ANTONINI, VIRGIL J. ANTONINI
and VIRGIL J. ANTONINI, Administrator

1. Plaintiff repleads the entire First Cause of Action with the exception of Paragraph 3 and the Second Cause

of Action of plaintiff B. C. Lawson Drayage, Inc. as though fully set forth herein.

2. Plaintiffs Rose J. Antonini, Virgil J. Antonini and Virgil J. Antonini, Administrator, are in partnership doing business as Antonini Fruit Express.

Class Action

Plaintiffs complain of defendants as follows:

1. All plaintiffs above named, acting on their own behalf and on behalf of all competitors of defendants, as hereinafter defined, similarly situated, as a class, bring this cause of action pursuant to Rule 23(a)(3) of the Federal Rules of Civil Procedure for treble the amount of damages suffered by them and each member of the class as a direct result of the defendants' violations of the antitrust laws of the United States and for injunctive relief.

2. Plaintiffs are informed and believe that within the State of California there are in excess of one hundred highway carriers who have been damaged by the defendants as described herein. Such carriers are:

A. Those carriers who have been harassed and financially depleted, weakened and damaged by the conduct of defendants alleged herein;

B. Those carriers who have been harassed and financially depleted, weakened and damaged and who have been restricted in, limited in, or precluded from extending their operating rights and capabilities by the conduct of the defendants alleged herein;

C. Those carriers who have been harassed and financially depleted, weakened and damaged and who have purchased or sold, or attempted to purchase or sell, existing carrier rights but who have been limited in, restricted from or precluded from consummating such purchases or sales because of the conduct of defendants alleged herein. The named plaintiffs and all of the above-described carriers are a class of persons herein called "competitors of defendants."

3. Because of the large number of competitors of defendants and the expense and burden to the parties and to the Court in litigating their claims separately, it is impractical to bring them all individually before the Court at this time.

4. The nature of the offenses charged and the commerce involved present substantial questions of law and fact common to the named plaintiffs and all other competitors of defendants; and the named plaintiffs fairly insure adequate representation of the interests of the entire class of competitors of defendants.

5. The named plaintiffs and the competitors of defendants, and each of them, hereby replead the First and Second Causes of Action of plaintiff B. C. Lawson Drayage, Inc. as though fully set forth herein.

Prayer

Wherefore, the plaintiffs pray:

A. That the conduct of the defendants as herein alleged be adjudged and decreed to be in violation of the antitrust laws;

B. That judgment be entered against the defendants for treble the amount of damages suffered by each named plaintiff as a result of the violations of the antitrust laws alleged herein as required by Section 4 of the Clayton Act (15 U.S.C. 15).

C. That each member of the class represented by plaintiffs who has been injured by the violations of the antitrust laws alleged herein be allowed to intervene in this action either before or after trial for the purpose of proving the amount of damages suffered by it, and that judgment be entered against defendants for treble the amount of damages so proved.

D. That plaintiffs be awarded their costs of suit, including reasonable attorneys' fees, as required by Section 4 of the Clayton Act.

E. That plaintiffs have such other and further relief as the Court shall deem just and proper.

F. That the Court issue an injunction against defendants as is herein requested, and such orders as are appropriate.

A jury trial is hereby demanded.

Dated: February 16, 1967.

Broad, Busterud & Khourie,
By Michael N. Khourie,
Attorneys for Plaintiffs.

Appendix D

RELEVANT PROVISIONS FROM THE U.S. CONSTITUTION, FEDERAL AND STATE STATUTES, AND RULES OF THE INTERSTATE COMMERCE COMMISSION AND CALIFORNIA PUBLIC UTILITIES COMMISSION.

I. U.S. Constitution

First Amendment:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

II. Sherman Antitrust Act

15 U.S.C. § 1:

Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty.

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

15 U.S.C. § 2:

Monopolizing trade a misdemeanor; penalty.

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, ..."

15 U.S.C. § 4:

Jurisdiction of courts; duty of United States attorneys; procedure.

"The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1-7 of this title; . . ."

III. Clayton Antitrust Act

15 U.S.C. § 15:

Suits by persons injured; amount of recovery.

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount of controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

15 U.S.C. § 25:

Restraining violations; procedure.

"The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of this Act, ..."

15 U.S.C. § 26:

Injunctive relief for private parties; exception.

"Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18 and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execu-

tion of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission."

IV. Interstate Commerce Act

49 U.S.C. § 306:

Application for Certificate of Public Convenience and Necessity.

"(a)(1) Except as otherwise provided in this section and in section 310a of this title, no common carrier by motor vehicle subject to the provisions of this chapter shall engage in any interstate or foreign operations on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations. . . .

. . . . . .

(6) On and after October 15, 1962 no certificate of public convenience and necessity under this chapter shall be required for operations in interstate or foreign commerce by a common carrier by motor vehicle operating solely within a single State and not controlled by, controlling, or under a common control

with any carrier engaged in operations outside such State, if such carrier has obtained from the commission of such State authorized to issue such certificates, a certificate of public convenience and necessity authorizing motor vehicle common carrier operations in intrastate commerce and such certificate recites that it was issued after notice to interested persons through publication in the Federal Register of the filing of the application and of the desire of the applicant also to engage in transportation in interstate and foreign commerce within the limits of the intrastate authority granted, that reasonable opportunity was afforded interested persons to be heard, that the State commission has duly considered the question of the proposed interstate and foreign operations and has found that public convenience and necessity require that the carrier authorized to engage in intrastate operations also be authorized to engage in operations in interstate and foreign commerce within limits which do not exceed the scope of the intrastate operations authorized to be conducted. . . ."

49 U.S.C. § 307:

Issuance of Certificate—Issuance authorized to qualified applicants for regular routes and between fixed termini.

"(a) Subject to section 310 of this title, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be

authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. . . .

(b) . . . ."

49 U.S.C. § 309:

Permits for Contract Carriers by Motor Vehicle.

"(a)(1) Except as otherwise provided in this section and in section 310a of this title, no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business. . . .

(b) Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to section 310 of this title, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this chapter and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit, will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such application shall be denied. In

determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements."

49 U.S.C. § 312:

Suspension, Change, Revocation and Transfer of Certificates, Permits, and Licenses.

"(b) Except as provided in section 5 [relating to combinations and consolidations of carriers] any certificate or permit may be transferred, pursuant to such rules and regulations as the Commission may prescribe. . . ."

V. California Public Utilities Code

§ 1005:

Issuance of certificate; terms and conditions.

"The commission may, with or without hearing, issue the certificate as prayed for, or refuse to issue it, or issue it for the construction of a portion only of the contemplated street railroad line, plant, or system, or extension thereof, or for the partial exercise only of the right or privilege, and may attach to the exercise of the rights granted by the certificate such terms and conditions, including provisions for the acquisition by the public of the franchise or permit and all rights acquired thereunder and all works con-

structed or maintained by authority thereof, as in its judgment the public convenience and necessity require; provided, however, upon timely application for a hearing by any person entitled to be heard thereat, the commission, before issuing or refusing to issue the certificate, shall hold a hearing thereon."

§ 1063:

Certificate of convenience and necessity; Grandfather rights; transfer of franchise.

"No highway common carrier, cement carrier, or petroleum irregular route carrier, shall begin to operate any autotruck, or other self-propelled vehicle, for the transportation of property for compensation on any public highway in this state without first having obtained from the commission a certificate declaring that public convenience and necessity require such operation. No such certificate shall be required of any highway common carrier as to the fixed termini between which or the route over which it was actually operating as a highway common carrier on July 26, 1917, and in good faith continuously thereafter, or for the performance of pickup, delivery, or transfer services by such carrier within such carrier's lawfully published pickup and delivery zones insofar as such pickup and delivery limits do not include territory in excess of three miles from the corporate limits of any city or three miles from the post office of any unincorporated point. The commission shall grant a certificate to operate as a cement carrier to any cement carrier as to the counties to and within which it was actually transporting cement as a cement carrier in good faith within one year prior to June 1, 1963, and continuously thereafter, provided such cement carrier applies to the commission for such certificate prior to

December 31, 1963, and submits adequate proof of such prior operations. The delivery of one or more loads of cement either in bulk or in packages to a point in a particular county shall constitute adequate proof of such prior operations and shall entitle applicant to authority to serve all points in said county from any and all points of origin. Any right, privilege, franchise, or permit held, owned or obtained by any highway common carrier, cement carrier, or petroleum irregular route carrier, may be sold, leased, transferred, or inherited as other property, only upon authorization by the commission."

§ 1731:

Application; grounds; grant; prerequisite to accrual of cause of action.

"After any order or decision has been made by the commission, any party to the action or proceeding, or any stockholder or bondholder or other party pecuniarily interested in the public utility affected, may apply for a rehearing in respect to any matters determined in the action or proceeding and specified in the application for rehearing. The commission may grant and hold a rehearing on those matters, if in its judgment sufficient reason is made to appear. No cause of action arising out of any order or decision of the commission shall accrue in any court to any corporation or person unless the corporation or person has made, before the effective date of the order or decision, application to the commission for a rehearing."

§ 1731:

Application; grounds; grant; prerequisite to accrual of cause of action [as amended in 1965]

"After any order or decision has been made by the commission, any party to the action or proceeding, or any stockholder or bondholder or other party pecuniarily interested in the public utility affected, may apply for a rehearing in respect to any matters determined in the action or proceeding and specified in the application for rehearing. The commission may grant and hold a rehearing on those matters, if in its judgment sufficient reason is made to appear. No cause of action arising out of any order or decision of the commission shall accrue in any court to any corporation or person unless the corporation or person has filed application to the commission for a rehearing before the effective date of the order or decision, or, if the commission fixes a date earlier than the 10th day after issuance as the effective date of the order or decision, unless the corporation or person has filed such application for rehearing before the 10th day after the date of issuance."

§ 1732:

Specification of grounds.

"The application for a rehearing shall set forth specifically the ground or grounds on which the applicant considers the decision or order to be unlawful. No corporation or person shall in any court urge or rely on any ground not so set forth in the application."

§ 1733:

Time for granting or denying application.

"Any application for a rehearing made 10 days or more before the effective date of the order as to

which a rehearing is sought, shall be either granted or denied before the effective date, or the order shall stand suspended until the application is granted or denied. Any application for a rehearing made within less than 10 days before the effective date of the order as to which a rehearing is sought, and not granted within 20 days, may be taken by the party making the application to be denied, unless the effective date of the order is extended for the period of the pendency of the application."

§ 1734:

Hearing; time for determination.

"If any application for a rehearing is granted without a suspension of the order involved, the commission shall forthwith proceed to hear the matter with all dispatch and shall determine the matter within 20 days after final submission. If no determination is made within that time, it may be taken by any party to the rehearing that the order involved is affirmed."

§ 1735:

Stay.

"An application for rehearing shall not excuse any corporation or person from complying with and obeying any order or decision, or any requirement of any order or decision of the commission theretofore made, or operate in any manner to stay or postpone the enforcement thereof, except in such cases and upon such terms as the commission by order directs."

§ 1736:

Order of abrogation, change, or modification; effect.

"If, after such rehearing and a consideration of all the facts, including those arising since the making

of the order or decision, the commission is of the opinion that the original order or decision or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate, change, or modify it. The order or decision abrogating, changing, or modifying the original order or decision shall have the same force and effect as an original order or decision, but shall not affect any right or the enforcement of any right arising from or by virtue of the original order or decision unless so ordered by the commission."

VI. Interstate Commerce Commission's General Rules of Practice

Rule 39 (49 C.F.R. § 1100.39):

Applications; notice.

"Appropriate notice of the filing of an application will be given by the applicant or by the Commission to the States, to State authorities, or to other persons as may be required by the form or instruction or by the act."

Rule 40 (49 C.F.R. § 1100.40):

Protests against applications.

"(a) *Content.* A protest against the granting of any application shall set forth specifically the grounds upon which it is made and contain a concise statement of the interest of protestant in the proceeding.

(b) *When filed.* Any protest shall be filed with the Commission promptly after the application is filed. If the proceeding be one respecting which the Commission has issued a notice advising the public of the filing of the application, the protest shall be filed within the time specified in such notice. Failure to file

a protest shall not prejudice subsequent participation in the proceeding.

(c) *Copies; service.* A protest filed under this section shall be served upon applicant and, unless otherwise specified in the public notice, the original and six copies of the protest shall be filed with the Commission.

(d) *When rule disregarded.* An application may be set for hearing without awaiting the filing of a protest or of a reply thereto, and also may be disposed of without regard to the prior paragraphs of this section unless the act provides that the particular application may be granted only upon hearing."

Rule 74 (49 C.F.R. § 1100.74):

Witness examination; order of procedure.

"Witnesses will be orally examined under oath before the officer unless their testimony is taken by deposition or the facts are presented to the Commission in the manner provided under modified or shortened procedure. In formal-complaint, application, and investigation proceedings complainant, applicant and respondent, respectively, shall open and close at the hearing, except at further hearings granted on petition the petitioner requesting further hearing shall open and close; and except, further, that parties other than the respondent shall open and close in investigations in which the burden of proof is not upon the respondent. Interveners shall follow the party in whose behalf the intervention is made. The foregoing order of presentation may be varied by the officer, who also shall designate the order of presentation in any other type of proceeding, of any other party to any proceeding, or of parties to several proceedings being heard upon a consolidated record."

Rule 76 (49 C.F.R. § 1100.76):

Evidence; cumulative restriction.

"It shall be the duty of the officer before whom any proceeding is being heard to limit the number of witnesses whose testimony may be merely cumulative. And in order to enforce this section, the officer may require a clear statement on the record of the nature of the testimony to be given by any witness proffered."

Rule 96 (49 C.F.R. § 1100.96):

Exceptions to officer's report.

"(a) *Generally.* Exceptions to the officer's report with respect to statements of fact or matters of law must be specific and must be stated and numbered separately. If exception is taken to conclusions in the report, the points relied upon to support the exception must be stated and numbered separately. When exception is taken to a statement of fact contained in the report, reference also must be made to the page or part of the record relied upon to support the exception and a corrected statement must be incorporated.

(b) *When filed.* Within 30 days after service of the officer's report, any party may file and serve exceptions thereto and reasons in support thereof. Replies may be served and filed as provided in Rule 23. In any case the Commission may, in its discretion, upon notice to the parties reduce or extend the time for filing exceptions or replies.

(c) *Exceptions and request for hearing by person not party.* If the proceeding is one in which no oral hearing has been held, any person not a party to the proceeding, but having an interest therein, may file and serve upon applicant, or complainant, as the

case may be, exceptions to the officer's report and reasons in support thereof. A request for hearing may be included therein but the exceptions need not include a request for hearing if none is deemed necessary."

Rule 101 (49 C.F.R. § 1100.101):

Petitions for rehearing, reargument, or reconsideration.

"(a) *In general.* (1) A petition seeking any change in a decision, order, or requirement of the Commission should specify whether the prayer is for reconsideration, reargument, rehearing, further hearing, modification of effective date, vacation, suspension, or otherwise.

(2) *Administrative finality of division and employee board decisions.* All decisions, orders, or requirements of a division of the Commission in any proceeding shall be considered administratively final, except those involving issues of general transportation importance, those wherein the division reverses, changes, or modifies a prior decision by a hearing officer, and those wherein the initial decision is made by a division; *Provided, however,* That this subparagraph shall not preclude the seasonable filing of a petition for relief under paragraphs (b) and (c) of this section, to be considered and disposed of by the division or appellate division which made the decision, order, or requirement as to which relief is sought. Decisions of an employee board, whether original or on review, are not administratively final. Such employee board decisions shall be subject to review by an appropriate appellate division of the Commission upon the filing of a timely petition in accordance with these rules of practice.

(3) *Limitations on petitions for review of division decisions.* Pursuant to authority granted in section 17(6) of the Interstate Commerce Act, the right to apply to the entire Commission for rehearing, reargument, or reconsideration of a decision, order, or requirement of a division of the Commission in any proceedings shall be limited and restricted to those proceedings in which the entire Commission, on its own motion, determines and announces that an issue of general transportation importance is involved. In proceedings in which no such announcement has been made, but in which a division reverses, changes, or modifies a prior decision by a hearing officer or where the initial decision is made by a division, a petition to the same division for rehearing, reargument, or reconsideration of its decision will be permitted and will be considered and disposed of by such division in an appellate capacity and with administrative finality.

(4) *Petitions seeking a finding that an issue of general transportation importance is involved; 3-page limitation; time for filing; no reply permitted.* In any proceeding which has involved the taking of evidence at oral hearing or by modified procedure in which the Commission has not noted the presence of an issue of general transportation importance, any party may, within 15 days after the service of a final decision, order, or requirement of a division or appellate division, as to which the filing of a petition for rehearing, reargument, or reconsideration is not permitted, file a petition requesting the Commission to find on its own motion that the proceeding is one involving an issue of general transportation importance. Any petition seeking such a finding shall not be considered an application for rehearing, reargument, or reconsider-

ation within the meaning of section 17 of the act and shall not exceed 3 pages. No reply thereto may be filed and the ruling thereon will be final. Petitions seeking the relief specifically covered herein will not be entertained at any other stage of the proceeding.

(5) *Copies of petitions and replies.* In cases in which it has been determined and announced that an issue of general transportation importance is involved, there shall be furnished for the use of the Commission the original and 14 copies of each petition filed under this section and of replies to such petitions. A like number of copies shall be furnished of petitions seeking a finding that the proceeding involves an issue of general transportation importance. In all other cases, the original and 7 copies of such petitions and replies shall be furnished for the use of the Commission.

(b) *Rehearing or further hearing.* When in a petition filed under this section opportunity is sought to introduce evidence, the evidence to be adduced must be stated briefly, such evidence must not appear to be cumulative, and explanation must be given why such evidence was not previously adduced.

(c) *Modification of effective date.* A petition under this section seeking only modification of the effective date of a decision, order, or requirement, or in the period of notice, or other period or date prescribed therein, must be filed seasonably, except that, in case of unforeseen emergency satisfactorily shown by petitioner, such relief may be sought informally by telegram or otherwise, provided like notice is simultaneously communicated to all parties of record.

(d) *Reconsideration.* If relief under this section other than under paragraphs (b) and (c) is sought,

the matters claimed to have been erroneously decided and the alleged errors or relief sought must be specified with the particularity respecting exceptions as outlined in Rule 96(a), as should also any substitute finding or other substitute requirement desired by petitioner.

(e) *Time for filing.* Except for good cause shown, and upon leave granted, petitions under this section must be filed within 30 days after the date of service of a decision or order, except as otherwise provided in the special rules of practice.

(f) *Successive petitions on same grounds, not entertained.* A successive petition under this section submitted by the same party or parties, and upon substantially the same grounds as a former petition, which has been considered and denied by the entire Commission will not be entertained.

(g) *Petitions for reconsideration of appellate division decisions on review of board decisions.* When an appellate division has denied a petition seeking a reversal, change, or modification of a determination whether original or on review by a board of employees, any further petition for reconsideration by the same party or parties upon substantially the same grounds will not be entertained. If in the consideration of such a petition, however, by the appellate division, the previous determination of the board of employees has been reversed, changed, or modified, a further petition may be filed by any party to the proceeding adversely affected by the decision of the appellate division, within the time specified in paragraph (e) of this section, and the petition will be considered and disposed of by the same appellate division which passed upon the initial petition."

Rule 247 (49 C.F.R. § 1100.247) [Adopted in 1964, as amended in 1966]:

[Special Rules]

. . . .

"(d) *Protests and request for hearing.* (1) Protests to the granting of an application shall be filed with the Commission within 30 days after the date notice of the filing of the application is published in the FEDERAL REGISTER. A protest filed under these rules shall certify that it has been served upon applicant's representative (or applicant, if no practitioner representing him is named in the notice of filing published in the FEDERAL REGISTER). Unless otherwise specified in the published notice, the original and one copy of the protest shall be filed with the Commission. Protests not in reasonable compliance with the requirements of these rules may be rejected in the discretion of the Commission.

(2) Failure seasonably to file a protest will be construed as a waiver of opposition and participation in the proceeding.

(3) A protest against any application shall set forth specifically the grounds upon which it is made and contain a detailed statement of the protestant's interest in the proceeding (including a copy of the specific portions of its authority which protestant believes to be in conflict with that sought in the application, and describing in detail the method (whether by joinder, interline, or other means) by which protestant would use such authority to provide all or part of the service proposed), shall request an oral hearing if one is desired, and shall specify with particularity the facts, matters, and things relied upon, but shall not include issues or allegations phrased gener-

ally. Protests phrased in general terms and not complying with these specifications may be rejected.

(4) Any request for an oral hearing shall be supported by a specific explanation as to why the evidence to be presented cannot reasonably be submitted in the form of affidavits, and shall set forth the number of witnesses which would be presented by the protestant and an estimate of the hearing time required for such presentation. Protests embracing a request for oral hearing shall contain the following certification without further qualification:

> The undersigned hereby certifies that, if an oral hearing is held, protestant(s) will appear and present evidence of protestant(s) own operations and particular interest(s) in the outcome of this application unless this application is amended so as to eliminate the interest(s) of protestant(s) as set forth in this protest.

(5) Where a person has a limited interest in an application, which possibly could be eliminated by a restrictive amendment to the application, which amendment must be acceptable to the Commission, it may also include in a protest filed in conformity with this paragraph an offer to withdraw the protest in the event of acceptance by applicant and the Commission of such amendment."

VII. California Public Utilities Commission's Rules of Practice and Procedure

Rule 21:

Common Carrier Certificates.

". . . [A]pplications for certificates . . . shall contain the following data . . . :

(f) The names of all common carriers with which the proposed service is likely to compete, and a certification that a copy of the application has been served upon or mailed to each such carrier named. Applications shall also name all other parties to whom copies of the application will be mailed. Applicants shall promptly notify the Commission of such mailing. Applicants shall also mail copies to such additional parties and within such times as may be designated by the Commission.

. . . ."

Rule 53:

Intervention.

"In a complaint proceeding petitions to intervene and become a party thereto shall be in writing, shall set forth the grounds of the proposed intervention, the position and interest of the petitioner in the proceeding, and whether petitioner's position is in support of or opposition to the relief sought. Such a petition shall be served and filed by petitioner at least five days before the proceeding is called for hearing, except for good cause shown. If petitioner seeks a broadening of the issues and shows that they would not thereby be unduly broadened, the petition shall be served and filed by petitioner at least ten days and the parties may serve and file replies at least five days, before the matter is called for hearing.

Leave will not be granted except on averments which are reasonably pertinent to the issues already presented, but do not unduly broaden them. If leave is granted, the petitioner thereby becomes an intervener and a party to the proceeding to the degree indicated by the order allowing intervention, or by the presiding officer at the hearing."

Rule 54:

Participation Without Intervention.

"In an investigation or application proceeding, or in such a proceeding when heard on a consolidated record with a complaint proceeding, an appearance may be entered at the hearing without filing a pleading, if no affirmative relief is sought, if there is full disclosure of the persons or entities in whose behalf the appearance is to be entered, if the interest of such persons or entities in the proceeding and the position intended to be taken are stated fairly, and if the contentions will be reasonably pertinent to the issues already presented and any right to broaden them unduly is disclaimed.

A person or entity in whose behalf an appearance is entered in this manner becomes a party to and may participate in the proceeding to the degree indicated by the presiding officer."

Rule 55:

Consolidation.

"Proceedings involving related questions of law or fact may be consolidated."

Rule 56:

Motion to Dismiss.

"A motion to dismiss (other than a motion based upon a lack of jurisdiction) any proceeding before this Commission, which is based upon the pleadings or any matter occurring before the first day of hearing may only be made upon five days' written notice thereof duly filed and served upon all parties to the proceeding and all other parties upon whom service of copies of the pleadings are therein shown to have been made."

Rule 57:

Order of Procedure.

"In hearings on complaints, applications and petitions, the complainant, applicant, or petitioner shall open and close.

In hearings on investigation proceedings where filed rates or rules which do not result in an increase have been suspended, the respondent shall open and close. In other investigation proceedings, the Commission's staff shall open and close. Interveners shall follow the parties in whose behalf the intervention is made. The presiding officer, where circumstances warrant, may vary the order of presentation."

Rule 62:

Designation.

"When evidence is to be taken in a proceeding before the Commission, one or more of the Commissioners, or an Examiner, may preside at the hearing."

Rule 63:

Authority.

"The presiding officer may set hearings and control the course thereof; administer oaths; issue subpoenas; receive evidence; hold appropriate conferences before or during hearings; rule upon all objections or motions which do not involve final determination of proceedings; receive offers of proof; hear argument; and fix the time for the filing of briefs. He may take such other action as may be necessary and appropriate to the discharge of his duties, consistent with the statutory or other authorities under which the Commission functions and with the rules and policies of the Commission."

Rule 75:

Briefs.

"The presiding officer may fix the time for the filing of briefs. Concurrent briefs are preferable. Exhibits may be reproduced in an appendix to a brief. A brief of more than twenty pages shall contain a subject index and table of authorities. Requests for extension of time to file briefs must be made to the Commission in writing, and a copy thereof served upon or mailed to the other parties to the proceeding. Ordinarily, when a matter has been submitted on concurrent briefs, extensions will not be granted unless a stipulation is filed with the Commission. The original of each brief shall contain a certification that copies have been served upon or mailed to each party or his attorney."

Rule 76:

Oral Argument.

"If the Commission or the presiding officer is of the opinion that the complexity or importance of the issues so warrant, the Commission or the presiding officer may direct or permit the presentation of oral argument."

VIII. Administrative Procedure Act (as codified prior to 1966 amendments)

5 U.S.C. §1008:

Hearings.

". . . .

"(b) Hearing powers—Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpenas authorized by law, (3) rule upon offers of proof and

receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.

. . . . ."